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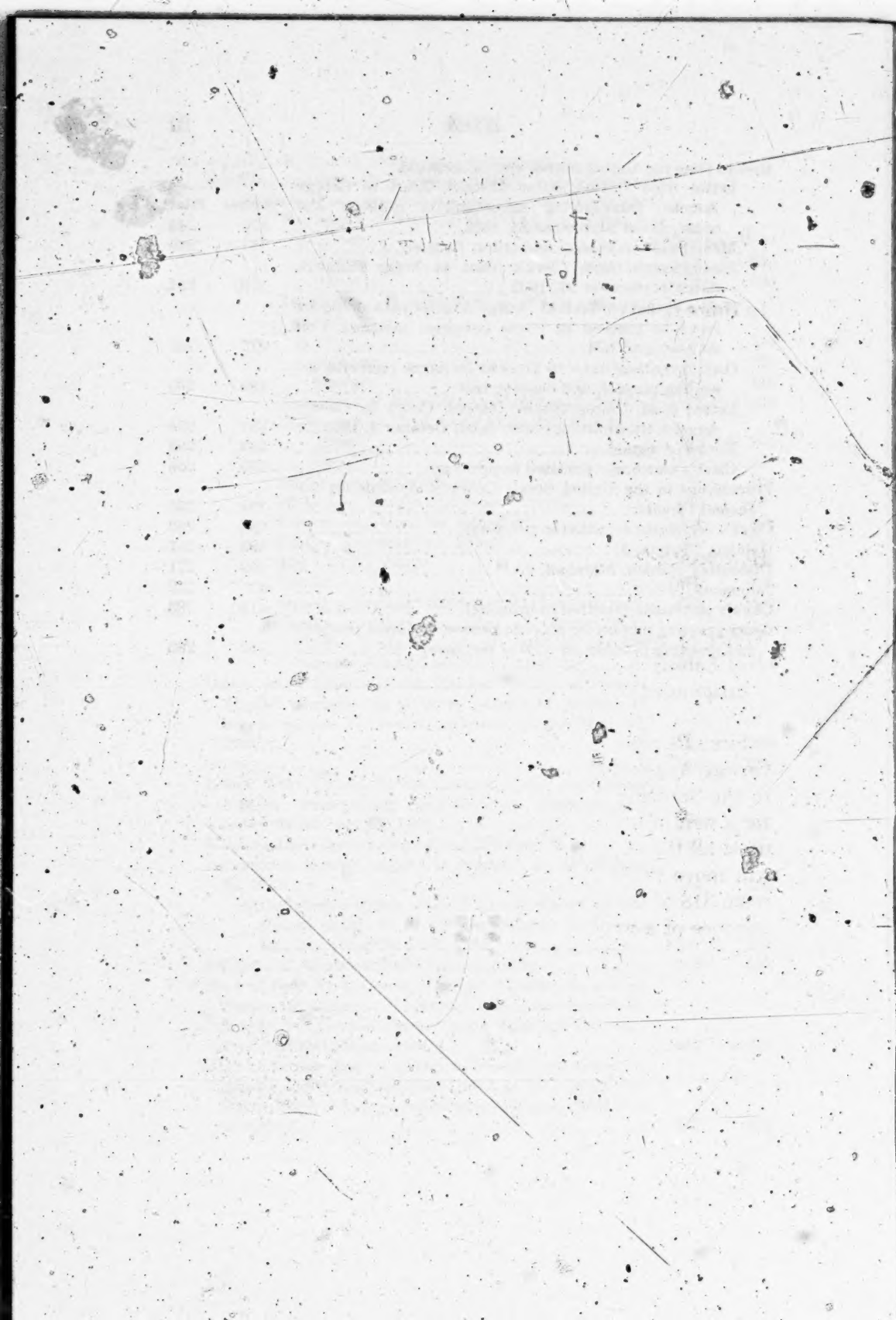

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[a] [File endorsement ommitted]

In United States District Court, Southern District of New York

(63 Civ. 1457)

UNITED STATES OF AMERICA, EX REL.,
GEORGE ANGELET, RELATOR-PETITIONER,

AGAINST

HONORABLE EDWARD M. FAY, AS WARDEN, GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT.

*Notice of and affidavit of George Angelet petitioning for writ of habeas corpus, leave to proceed in forma pauperis, and assignment of counsel—Filed May 21, 1963*

Sirs: Please take notice that upon the annexed affidavit of George Angelet and upon the briefs of the Appellate Division of the Supreme Court of the State of New York, the petition for a writ of certiorari appended to the aforesaid affidavit and upon all the papers and proceedings heretofore had, petitioner will move this Court at a motion part thereof to be held in room 318 of this Court on the 24th day of May, 1963, for the issuance of a writ of habeas corpus (28 U.S.C. section 2241);

leave to proceed in forma pauperis and the assignment of counsel.

Dated: Stormville, New York, the 15th day of May, 1963.

Yours, etc.,

GEORGE ANGELET,
*Relator-Petitioner,*
*Drawer B,*
*Stormville, New York.*

To:

Hon. LOUIS J. LEFKOWITZ,
*80 Centre Street,*
*New York 13, New York.*

JAMES E. VALECHE, *Clerk,*
*United States District Court,*
*New York 7, New York.*

[b] [File endorsement omitted]

In United States District Court, Southern District of New York

(63 Civ. 1457)

UNITED STATES OF AMERICA, EX REL.,
GEORGE ANGELET, RELATOR-PETITIONER

AGAINST

HONORABLE EDWARD M. FAY, AS WARDEN, GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT

STATE OF NEW YORK,
*County of Dutchess, ss:*

George Angelet, being duly sworn, deposes and says:

1. That he is the above named petitioner and makes this application in person. No previous motion for the relief herein sought had been presented for judicial consideration.

2. This is an application pursuant to 28 U.S.C. section 2241 as to allow this Court to enquire into the constitutional propriety of petitioner's confinement in a New York State prison;

for leave to proceed in this forum as a poor person and for the assignment of counsel.

3. Petitioner is confined in Green Haven State Prison, State of New York, under a commitment emanating from the former court of general sessions now the Supreme Court of New York County, sentencing petitioner as a second felony offender pursuant to a jury verdict convicting him of a felonious possession of a narocotic drug contrary to the penal statute section 1751 thereof, to a term of from 10 to 20 years. Petitioner has been under uninterrupted imprisonment.

[c] 4. Petitioner's imprisonment for the past 13 years has left him totally impoverished. He possesses no chattels or property which can be transmogrified to cash. Petitioner is a citizen of the United States by virtue of birth in the United States and is over the age of 21. He respectfully prays that this court permit the institution of this litigation *in forma pauperis*.

5. The basis of petitioner's constitutional claim is the landmark decision of the United States Supreme Court in *Mapp* v. *Ohio*.[1] Petitioner through the vehicle of the writ of error coram nobis assailed the constitutional propriety of his imprisonment upon the premise the entire evidentiary content of his trial in 1951 was the product of an unlawful, unreasonable, search and seizure.[2] The fact, that petitioner's conviction rested exclusively upon constitutionally tainted evidence, has not been disputed by the State of New York. The State of New York, however, maintains petitioner is foreclosed from the benefit of *Mapp* since petitioner's conviction and sentence antedate the Mapp case by 11 years.

In a word, the State contends that *Mapp* is to be prospective while petitioner contends that the United States Supreme Court decision in *Mapp* as any constitutional diktat is retrospective. The writ of error coram nobis was denied without a hearing,[3] affirmed by the Appellate Division of the New York Supreme Court for the First Judicial Department, unanimously and without opinion.[4] Leave to appeal to the New York Court of Appeals was denied by the Hon. Stanley H. Fuld.

---

[1] 367 U.S. 643.

[2] United States Constitution Amdts. 4 and 14.

[3] 221 N.Y.S. 2d. 831.

[4] 18 A.D. 2d. 649.

[d] 6. Petitioner's petition for a writ of certiorari to the New York Court of Appeals is presently *sub judice* (*Angelet* v. *New York*, Misc. #1095).

Petitioner had applied for certiorari prior to the advent of *Townsend* v. *Sain*.[5] The *Townsend* case now makes optional the petitioning for certiorari or the application as contemplated by 28 U.S.C. section 2241. Petitioner now moves before this forum for a hearing upon his constitutional claim agreeing with the United States Supreme Court that the record of the proceedings heretofore had in the available State processes fall infinitely below complementary character.

7. Petitioner's Appellate Court brief, the respondent's State response, as well as the petition for a writ of certiorari extensively depict the issue sought to be reviewed here. Petitioner respectfully prays that that argument as portrayed by the aforesaid instruments be accepted here as though set forth *ad rem*.

8. The sole adventitious matter petitioner respectfully directs the Court's attention to is the recent decision of the United States Court of Appeals for the Fourth Circuit in *Leonard Hall, Jr.* v. *Warden, Maryland Penitentiary*, decided on January 17, 1963, holding the *Mapp* decision to be retrospective in application.

[e] WHEREFORE, petitioner prays that he be accorded the plenary hearing prescribed by *Townsend* v. *Sain*, supra, in accordance with due process of law.

Respectively submitted.

George Angelet,
GEORGE ANGELET,
*Relator-Petitioner in person,*
*Drawer B, Stormville, New York.*

Sworn to before me this 15th day of May 1963.

George M. Snyder,
GEORGE M. SNYDER,
*Notary Public, Dutchess County.*

My commission expires Mar. 30, 1964.

*Affidavit of Service*
[Omitted in printing]

[5] 372 U.S. —; 31 L.W. 4297, 4303.

[f] In the Supreme Court of the United States

October Term, 1962

No. —

GEORGE ANGELET, PETITIONER

*v.*

STATE OF NEW YORK

*PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK*

GEORGE ANGELET,
*Drawer B,*
*Stormville, New York,*
*Petitioner in person.*

[g] Supreme Court of the United States
October Term, 1962

*Affidavit in Forma Pauperis*

GEORGE ANGELET, PETITIONER

*v.*

STATE OF NEW YORK

STATE OF NEW YORK,
*County of Dutchess, ss:*

May it please the Court, I, George Angelet, do solemnly swear that I make this affidavit in good faith, that I am without any financial means, possess no property or chattels or any material object that could be converted into money to defray the cost of printing the moving papers pertaining to the applied writ of certiorari, or am I able to financially employ an attorney to present my petition. I am constrained to proceed in propria persona and to submit my petition in forma pauperis

because I am financially destitute within the meaning of the law constituting the definition of a pauper.

Respectfully submitted,

GEORGE ANGELET,
*Petitioner in Person,*
*Drawer B,*
*Stormville, New York.*

Sworn to before me this day of February, 1963.

[h] Supreme Court of the United States

October Term, 1962

*Petition for a Writ of Certiorari*

GEORGE ANGELET, PETITIONER

*v.*

STATE OF NEW YORK

STATE OF NEW YORK,
*County of Dutchess ss:*

May it please the Court, George Angelet, being duly sworn, deposes and says:

That he is the above named petitioner and makes this application for a writ of certiorari to review a denial of petitioner's application for leave to appeal to the Court of Appeals of the State of New York, by the Hon. Stanley H. Fuld, an Associate Judge of the Court of Appeals.

A certificate of denial was entered on the 8th day of February, 1963 (appendix, 1A, 2A, *infra*).

Petitioner proceeds herein in propria persona and applies for leave to proceed *in forma pauperis.*

[i] *Citation to opinion below*

The Court below denied without opinion, other than the New York authority of *People* v. *Muller*, 11 N.Y. 2d. 154, 156. The Appellate Division, First Judicial Department had affirmed an order of the former Court of General Sessions which

denied without a hearing petitioner's application for a writ of error coram nobis moving for the effacement of a judgement of conviction entered on February 27, 1951, sentencing petitioner after a trial to a term of from 10 to 20 years as a second felony offender for a conviction pursuant to section 1751 of the New York Penal Law (*People* v. *Angelet*, 17 A.D. 2d.; *People* v. *Angelet*, 221 N.Y.S. 2d 834). The appealed from coram nobis denial was bottomed upon the landmark decision in *Mapp* v. *Ohio*, 367 U.S. 643.

*Jurisdiction*

The certificate of denial of petitioner's application for leave to the Court of Appeals of the State of New York was entered on February 8, 1963 (appendix, 1A, 2A, *infra*).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States.

[j] QUESTION PRESENTED

1

Does *Mapp* v. *Ohio*, 367 U.S. 643, apply retrospectively?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

1. Fourth amendment to the United States Constitution;
2. Fifth amendment to the United States Constitution;
3. Section 1 of the fourteenth amendment to the Constitution of the United States.

OTHER PAPERS

Submitted herewith are copies of the briefs submitted in the Appellate Division and to Judge Fuld on the application for leave to appeal.

STATEMENT

The briefs submitted upon the aforementioned State Appeals contain a comprehensive outline of the peculiar facts attending

the instant case. Petitioner prays that the Court accept the Summary as set forth in the State Court briefs as though set forth herein verbatim, in the interest of brevity.

[k] The threshold question to be determined by this proceeding is whether the Court intended its decisions in *Mapp* v. *Ohio*, 367 U.S. 643, to have only prospective effect.

In *Laabs* v. *Wisconsin Tax Commission*, 218 Wis. 414, 216 N.W. 404 (1935), the Wisconsin Supreme Court had occasion to decide the effect to be given the Court's decision in *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, which overruled its decision in *Long* v. *Rockwood*, 277 U.S. 122 (1928), and held that income from patent royalties was subject to taxation by the States. The Wisconsin Court declared:

> "The question is whether the decision of the United States Supreme Court in the *Fox Film Corporation* case was retrospective in operation and effect. The determination of this question is for the Supreme Court. So far as we can discover, the Court has never expressly passed upon this question, and we can only resort to the general rule and to such analogies as are to be drawn from cases which, while not in point, may disclose the attitude of the Court upon the question. . . ."*
>
> 216 N.W. at 406.

[l] As the opinion of this Court in *Mapp* never directly focused on the problem of prospective effect. A logical starting point in seeking clarification would be to follow the technique suggested in *Laabs*, supra, and determine what effect has generally been given to overruling opinions in American law. The traditional theory of American law was authoritatively set forth in Blackstone who believed that judges do not create new law but merely find the pre-existing law and then declare it. Thus, a prior judicial decision is not the law itself but only evidence of what the law is. Blackstone knew that judges changed their rulings on points of law but this did not, to him, indicate any lawmaking function on their part:

*The Wisconsin Supreme Court held that the Supreme Court intended that its overruling decisions be given retrospective application. Subsequent decisions by the Supreme Court, have, as shall be demonstrated, made the intention even clearer.

"* * * but even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law but that it was not law * * *"

1 Blackstone, Commentaries 70

Under this theory overruling decisions always apply retrospectively. The overruling decision is not considered to have been either the old law or bad law but rather to be and have been no law. An examination of the most recent cases concerning themselves with this problem would indicate that this declaratory concept of law is still the one adhered to by the American courts.

[m] As the Tenth Circuit stated in *Sunray Oil Co.*, v. *C.I.R.*, 147 F. 2d, 962, *cert. den.* 325 U.S. 63 (1938):

> "It is general rule that the decision of the highest appellate court of a jurisdiction overruling a former decision is retrospective in its operation. In effect, it declares that the former decision never was law." 147 F. 2d, at 963–64

It is stated in American jurisprudence that "The general principle is that a decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." 14 Am. Jur., courts, section 130. See, to the same effect, 21 O.J.S., courts, section 194. This principle that pervades our law, is reiterated either with, or without, quotation, by virtually every court which has been confronted with the problem. Cases decided during the past 17 years setting forth the Blackstonian theory* as an explanation of the rule requiring retrospectivity include, *Massaglia* v. *C.I.R.*, 286 F. 2d. 258 (10 Cir. 1961); *County of Los Angeles* v. *Faus*, 48 Cal. 2d. 672 (1957); *Johnson* v. *State*, 18 N.J. 422, 144 A. 2d. 1 (1955); *Peerless Electric Co.* v. *Bowers*, 164 Ohio St. 209

*The rule requiring retrospectivity is not dependent upon the Blackstonian theory. It can be justified as in accord with the concept that the function of a common law court is to render a legal decision as to the consequences of facts that have already occurred while the function of a legislature is to make rules that apply only prospectively.

(1955); *Texas Co.* v. *Oklahoma Tax Commission*, 249 P. 2d. 985 (Okla. 1952); *Libby, McNeill & Libby* v. *Wisconsin Dept. of Taxation*, 260 Wis. 551 N.W. 2d. 796 (1952); *Mickel* v. *New England Coal & Coke Co.*, 132 Conn. 671, 47 A. 2d. 187 (1946). [n] In *Cammack* v. *Slattery & Bros., Inc.*, 241 N.Y. 39, 46 (1952) the New York Court of Appeals clearly acknowledged its lack of power to overrule prospectively. It stated that:

> "* * * this Court has been unwilling to make a decision generally annulling and destroying well-settled rules pertaining to the use of seals. Such a decision without reservations, which we would be unable to make would result in affecting contracts in a manner which would be chaotic and unjust. If the use of seals as now required is to be generally discontinued this result should be accomplished by the legislature, serving the integrity and force of contracts already executed * * *".

In *People Ex Rel Rice* v. *Graves*, 242 App. Div. 128, 273 N.Y. Supp. 582 (3d Dept. 1934), aff'd, 270 N.Y. 498, *cert. den.* 298 U.S. 683 (1936), the Court, in determining whether a decision of this Court overruling a prior decision should be given retrospective effect, followed the theory set forth in *Butler* v. *Van Wyck*, 1 Hill 438, 462 (1841), and approved in *Leavitt* v. *Blatchford*, 17 N.Y. 521 (1858), and held that it must be given such effect. "An overruling decision does not change law, but impeaches the overruled decision as evidence of law * * * it is an elementary principle that an erroneous decision is not bad law—it is no law at all." 242 App. Div. at 135; 273 N.Y. Supp. at 590.

In *Lawrence-Cedarhurst Bank* v. *Ruth*, 162 Misc. 82, 294 N.Y. Supp. 810 (Sup. Ct. 1937), it appears that a note had been given to a bank under an express agreement that no demand would be made for payment or interest unless and until the bank had gone into liquidation. [o] at the time this transaction was consummated, *Higgins* v. *Ridgway*, 153 N.Y. 130 (1897), which held such an agreement valid "was apparently the Court's exposition of the law * * * upon which the parties had a right to rely." However, it was overruled by *Mt. Vernon Trust Co.* v. *Bergoff*, 272 N.Y. 192 (1936), which held such an agreement invalid. The Court taking into consideration the

suggestion of prospective overruling made by Chief Judge Cardozo in his address to the New York State Bar Association in 1932 (address by Chief Justice Cardozo, New York State Bar Association, January 22, 1932, in 55 reports of N.Y.S.B.A. 263, 294–96 (1932), and the proposals to the same effect by Professor Wigmore concluded:

> "[T]hat is not the law of this State. On the contrary, a judicial decision is merely evidence of the law and is not the law itself. When such a decision is overruled, it does not become bad law; it never was the law and the overruled decision is regarded as if it never had existed and the reconsidered or new decision is regarded as the law from the beginning. Consequently, it is obvious that an overruling decision operates retroactively." 162 Misc. at 87; 294 Supp. at 815–16.

Therefore, the law as expounded in *Mt. Vernon Trust Co.*, supra, was held applicable to the earlier transaction and the note was enforced despite the fact that the condition precedent of the bank's being liquidated had not occurred.

[p] Recently, in *Weissman* v. *Buker*, 1 A.D. 2d, 30, 34; 147 N.Y.S. 2d, 101, 105 (3d. Dept. 1955), the Appellate Division noted that:

> "There is an interesting distinction between a statutory enactment with its usual prospective effect and a decision of a court. In common-law theory the court declared the law as it had existed from the beginning of time. A reversal for error was not commonly regarded as a new pronouncement but as a declaration of what had always been the law, but mistakenly interpreted."

United States Supreme Court decisions have even been applied retrospectively in cases where a later decision created a new Federal rule of evidence which was not of a constitutional nature but which would have prevented the introduction of the evidence upon which the prior conviction had been secured. See the decisions following the opinion of this Court in *Monabb* v. *United States*, 318 U.S. 332 (1943) holding confessions obtained during a period of illegal detention inadmissible even if

voluntarily made. *Gros* v. *United States*, 136 F. 2d, 878 (9 Cir. 1943); *Runnels* v. *United States*, 138 F. 2d 346 (9 Cir. 1943); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir. 1943).

Following this background it becomes easier to understand the treatment of the problem of retrospective application in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). This Court held that it violated the due process and equal protection clauses of the fourteenth amendment to deny indigent prisoners appellate review of their convictions solely on the basis of indigency. Justice Black's opinion did not discuss the problem of retrospective application. Justice Frankfurter, in his concurrence, however, [q] focused on this problem at some length. He remarked that:

> "The Court ought neither to rely on caustic arguments in denying constitutional claims, nor deem itself imprisoned within formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective or to rejection of what the requirements of equal protection of the laws, as now perceived, require * * *
>
> We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conductive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See address of Chief Judge Cardozo, 55 report of New York State Bar Assn., 263–298 et. seq. and *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 363–366. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated."

Justice Frankfurter's plea went unheeded. That the absence of discussion of retrospective effect in Justice Black's opinion in

*Griffin*, merely indicated that he was adhering to the Court's traditional and never varied policy of applying all its decisions retrospectively became clear in 1958.

One Eskridge, after his conviction in 1935, had unsuccessfully sought a free copy of the trial transcript in the State court in order to prosecute his appeal. In a 1956 State habeas corpus proceeding he claimed that the failure to furnish a free trial transcript violated his Federal constitutional rights.

[r] On certiorari this Court reversed the State denial of relief and remanded the case. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958). In a per curiam opinion, the Court stated, after recalling the holding in *Griffin* that "Washington has denied his constitutional right here." Justices Harlan and Whittaker dissented, "Believing that on this record the *Griffin* case decided in 1956 should not be applied to this conviction occurring in 1935."

Thus, again not even deeming the matter worthy of discussion the majority required that its decision be given retrospective effect.

No distinction has been made during the preceding discussion between a decision being applied retrospectively in a criminal case on direct appeal or on a collateral attack, such as here, on coram nobis. This is because no distincton exists when there is an allegation that a Federal prisoner has been deprived of rights guaranteed him by the Bill of Rights or that a State prisoner has been deprived of a basic right secured him by the fourteenth amendment. There is no distinction for application of the general rule of retrospectivity, means, that the prisoner's basic rights were violated, though unknown to Court, counsel and defendant, at the time of his trial, and that such violation deprived the Court of jurisdiction. Such a lack of jurisdiction may be asserted on collateral attack at any time. Cf. *Johnson* v. *Zerbest*, 304 U.S. 458; *Davis* v. *Wechsler*, 263 U.S. 22; *Mattox* v. *Sachs*, 369 U.S. 65; *Noia* v. *Fay*, 300 F. 2d. 345, *cert. granted*, 369 U.S. 869.

[s] In order to hold that *Mapp* is to be given only prospective application, this Court must do so without precedent. Never, has a constitutional decision been applied prospectively only, nor, has there been precedent that the Court is so em-

powered to apply constitutional precedent's other than retrospectively.

*Mapp* v. *Ohio*, did not make the search and seizure here complained of a violation of petitioner's rights. The court did not for the first time in *Mapp* lay down the rule that:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

That rule has been part of the organic law for over one hundred sixty years.

What the Court did hold was that the policy considerations which closed the doors of the Federal courts to State prisoners were no longer applicable and that the doors were now open. Viewed in that aspect, petitioner is entitled to proceed in this Court as any post *Mapp* petitioner, for he claims a violation of his rights under the Constitution of the United States which was a clear violation of his right at the time of his State court trial. *Wolf*, merely disabled him from proceeding in a Federal court to assert his rights. Since that disability has been removed he should be considered as any post *Mapp* petitioner. [t] It is submitted that this question is of substantial national importance and merits plenary consideration and hearing before this court.

## CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should issue.

Respectfully submitted,

GEORGE ANGELET,
*Petitioner in person,*
*Drawer B,*
*Stormville, New York.*

Sworn to before me this day of February, 1963.

COPY OF PETITION

[u] Supreme Court of the United States

October Term, 1962

GEORGE ANGELET, PETITIONER

*v.*

STATE OF NEW YORK

STATE OF NEW YORK,
*County of Dutchess, ss:*

George Angelet, being duly sworn, deposes and says: That he has duly mailed a copy of the foregoing petition for a writ of certiorari to the respondent through the medium of the United States Post Office, and addressed as follows:

Hon. FRANK S. HOGAN,
*District Attorney,*
*New York County,*
*155 Leonard Street,*
*New York 13, New York.*

Yours, etc.,

GEORGE ANGELET,
*Petitioner in person,*
*Drawer B,*
*Stormville, New York.*

Sworn to before me this day of February, 1963.

[v] State of New York

Court of Appeals

STANLEY H. FULD, *Judge.*

February 8, 1963.

Mr. GEORGE ANGELET,
*No. 7546, Drawer B, Stormville, New York.*

DEAR SIR: Judge Fuld has asked me to tell you that he has decided to deny your application for leave to appeal. Accord-

ingly, I enclose the certificate which the judge has signed to that effect. (See, e.g., *People* v. *Muller*, 11 N.Y. 2d, 154, 156.)

Very truly yours,

*Law Secretary.*

cc: to Honorable Frank S. Hogan, *District Attorney, New York County.*

[w]

State of New York

Court of Appeals

Before Hon. STANLEY H. FULD, ASSOCIATE JUDGE

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

*against*

GEORGE ANGELET, DEFENDANT-APPELLANT.

CERTIFICATE DENYING LEAVE

I, Stanley H. Fuld Associate Judge of the Court of Appeals of the State of New York do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to Section 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York, February 8, 1963.

STANLEY H. FULD,

*Associate Judge.*

[1] *Exhibit to Petition*

In Court of General Sessions of the County of New York.
Part Eight

Indictment No. 2947–50

THE PEOPLE

*against*

GEORGE ANGELET

Before Hon. JONAH J. GOLDSTEIN, J., and a Jury.

Indicted for Possessing a Narcotic Drug with Intent to Sell, and Unlawfully Possessing a Narcotic Drug.

Indictment filed January 4, 1951.

Transcript of Proceedings
New York, January 30, 1951.

Appearances:

For the People: *Ernest Lappano*, Esq., Assistant District Attorney.

For the Defendant: *George J. Todaro*, Esq., *Sol Gelb*, Esq.

*Selection of Jurors*

(The Talesmen were examined, and at the conclusion of the day, eight jurors were duly selected and sworn.)

The COURT. Members of the jury: you are admonished not to discuss the case with each other, nor permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you.

The eight jurors who are in the jury box will re- [2] convene in the jury room adjoining the courtroom. This is Part Eight, 13th Floor. Be on hand at 11:00 o'clock tomorrow morning.

All other jurors who have not yet been examined, report to this courtroom tomorrow morning at 11:00 o'clock.

(Thereupon the further trial of the case was adjourned until the following day, January 31st, 1951, at 11:00 A.M.)

[3] New York, January 31st, 1951.

(Trial Resumed.)

(The Talesmen were further examined as to their qualifications, and four more jurors were duly selected and sworn, making the total twelve.)

The COURT: The Court deeming it advisable, I direct that two alternate jurors be impanelled, who shall serve in accordance with the provisions of the Code of Criminal Procedure.

(Thereupon the Talesmen were further examined, and two alternate jurors were duly selected and sworn.)

*Opening Remarks of the Court*

The COURT: After a jury has been impanelled, it is my practice to make a few observations that I think will be helpful, particularly to those of you who are serving as jurors in this Court for the first time.

The case will open with a statement by the Assistant District Attorney as to what he intends to prove. That is known as an opening to the jury. The law requires the District Attorney to make an opening statement, to enable the Court and jury better to understand the testimony. It is similar to describing the design of a mosaic before fitting the pieces.

The defendant is not required by law to make an opening statement. He has a right to waive making an opening statement, and wait and see whether the prosecution proves [4] a case.

Bear in mind that the statements of the District Attorney or of defense counsel as to what he intends to prove are not evidence.

Witnesses are called to the stand, and after being sworn are examined and cross-examined. The questions asked by the lawyer calling the witness is known as direct examination. The testimony brought out through the asking of questions by the lawyer on the opposite side is known as cross-examination.

After both lawyers are through examining a witness, if any-

thing should occur to you that you would like cleared up by the asking of a question, do not hesitate to make your wish known. While it is your right to ask questions orally, I suggest that you submit the proposed questions in writing to me. I will direct, if the question is a proper one, that it be answered by the witness.

I make this observation because from experience we have found that sometimes after jurors retire for deliberation they debate among themselves why a certain question was not asked of a witness. It may not have been asked because it did not occur to either side; or it may not have been asked because the lawyers on both sides knew that the question was not a proper one under the rules of law. In either event it is more sensible to clear up what you have in [5] mind while the witness is on the stand than to debate about it afterwards.

Please bear in mind that those questions should not be asked until both sides are through examining the witness. I say this because ofttimes the question you have in mind will be asked and answered before the examination has been completed. Please remember to submit questions in writing. The reason I make that suggestion is it sometimes happens that a question which seems to be a very sensible one to a lay person may be highly objectionable under the rules of law. That is why I suggest you submit the proposed question in writing.

You have a right to carry the testimony of the witnesses in your own mind or make notes of the testimony. The choice is with you.

Always bear in mind that questions are not evidence. Questions merely help you understand the answers. Let me illustrate: If A is asked: "Did you hit Jones on January 1st? Answer: No." "Did you hit Smith on February 1st? Answer: No." If you stop and think, you will see that you have no right to infer from the asking of those questions that A hit either Jones or Smith.

During the trial either lawyer may object to the asking of a particular question. That means the lawyer making the objection urges that the question is not a proper one. I, [6] as the Judge, must then rule as to whether it is or is not a proper question. If I believe the question is proper, I will say "Ob-

jection overruled." If in my opinion the objection is a valid one, I will say "Objection sustained".

When I sustain an objection, I rule that the question is an improper one. When I so rule, you must draw no inference either from my ruling or from the question.

When I sustain an objection to a question, you then have a question which I have ruled is an improper one, and you have no answer. Therefore, if you stop and think, you will see that you have no right to draw any inference from the asking of the question or from my ruling.

Sometimes the witness "jumps the gun", to use an athletic term, by answering before I have an opportunity to rule on the objection. In that event, if I sustain the objection I will direct that the answer be stricken out. When I direct that an answer be stricken out, it becomes your duty to strike it from your minds, and, as far as humanly possible, forget that it was ever made.

If during the course of the trial you should desire a brief recess for personal reasons, do not hesitate to make your wish known to the court officer, and I will declare such a recess. I make this observation because from experience I find that grownups often show poorer judgment than do youngsters when they want to leave the school room.

[7] The law requires on each adjournment, no matter how brief, that I give you certain admonitions. Of course, you understand that there is a corresponding duty on your part to obey them strictly. When I repeat those admonitions I do so because the law requires that they be repeated, and not because I think you have forgotten them.

I admonish you, and it is your duty, not to read any items concerning this case which may appear in the daily newspapers. I have no way of knowing whether any newspaper men may drop in during the course of the trial and have this case written up in the press. Should that happen, it is your sworn duty not to read those items. Pay no attention to them, because it is your sworn duty to judge this case solely upon the evidence presented from the witness stand. You must not permit newspaper articles to influence your consideration.

Let me admonish you not to visit the scene of the crime or any of the places mentioned in the testimony. It sometimes happens during a trial that one or more witnesses will take the stand and describe a place one way. Other witnesses will take the stand and describe the place differently. Then one or more jurors, with the best motives, might decide to do a little sleuthing on their own. They go up to take a look. And then when they get into the jury room, the question comes up as to how the place looks. This zealous juror will say: "Let me tell you how it looks. I saw it." And he then [8] goes on to describe what he saw. No juror has a right to do that. If ever it becomes advisable or desirable to visit a scene of crime, or any of the places mentioned in the testimony, all of us will visit it together. The reason for that rule of law is that when you looked at the place it may not have been in the same condition as it was at the time concerning which the testimony was given. No juror should acquire information not presented to all the jurors in Court.

After the trial should you desire any information concerning the practices or procedure, do not hesitate to ask the Clerk or ask me. We will try and give you the information you seek. I say this because there should be no mystery in the administration of justice. For example, those of you who have never served in a criminal case before may not understand why we have two alternate jurors: In civil cases there are no alternate jurors, because a civil case can be tried with less than twelve jurors, and a verdict may be rendered by less than twelve jurors. A criminal case, such as this, could not be tried with less than twelve jurors, and there can be no verdict unless all twelve agree. Very fortunately, the law, to use an automobile term, permits us to carry two "spares", or, to use a theatrical term, we have two "understudies", because without the alternate jurors if anything were to happen to the first twelve jurors selected that prevented them from continuing in the case, there would be a breakdown of the trial and you would have to try the [9] case all over again.

Now, please keep these observations in mind, and I trust that they will prove helpful.

*Opening Statement on Behalf of the People*

(Mr. Lappano made an opening statement to the jurors, on behalf of the People, as follows:)

Mr. LAPPANO. May it please your Honor, Mr. Gelb, members of the jury: As his Honor quite properly admonished you, the time has come when, according to law, the duty is placed upon the District Attorney to make to the jury the opening statement. And, as his Honor also said, and I want to repeat, in all fairness, what I say to you, or what I am about to say to you now as to what the People of the State expect to prove, I don't want you to accept the statements that I am about to make as if it were evidence of any kind—testimony of any kind. It definitely is not that. It is the statement of an attorney who represents one side of a litigation. It happens to be a criminal case. But it is the statement of the attorney for that side, and I just chance to be the Assistant District Attorney who presents the People's case,—as to what he expects to prove. Whether or not that which I say will be proven to your satisfaction beyond a reasonable doubt, as his Honor will instruct you at the proper time concerning a reasonable doubt, Mr. Foreman and ladies and gentlemen of the jury, of course you will only determine that after the entire case has been submitted to you.

[10] However, I am confident—and I say this most respectfully—that in this case the People will prove beyond any reasonable doubt that on this date of December 21st, 1950, this defendant had in his possession, in a room of his apartment at 527 West 134th Street, here in the County of New York, more than two ounces of narcotic drugs; and that entirely apart from the presumption that we were talking about during the selection of the jury—the presumption raised by the law itself that we talked about, and you may recall it—I say, entirely apart from that, the People will show you the circumstances surrounding the finding of this narcotic, the paraphernalia that was found also at the same time, the discussions had by the arresting officers with the defendant at the time, that he possessed these drugs, heroin and cocaine, not as a user—that he was to use it himself—because we will show you that he was questioned about that and he said "What do you think? I'm

crazy, using this stuff?" That he told these police officers that he had been in the racket of selling "junk" or "dope" before they found—after searching this apartment—before they found this quantity of drugs. We will prove to you that this defendant, when first questioned, had told the police that he had been in the drug-selling racket, but that he had stopped. And he told them that when they found—before they found the drug themselves—when [11] they found a scale which is used for measuring the drugs; they found a number of empty capsules; they found a number of cellophane envelopes; they found a jar containing milk sugar, which is used to dilute or to make a mixture of the heroin with, but before finding the drugs. The officers will testify that he said "Oh, yes, I was in the racket, but now I have given it up. Too many stool pigeons, too much activity by the police. I gave it up."

"Well, you got it." He admitted to those officers only when they actually found the stuff, that he possessed it to sell—not to use for himself at all.

We will show you that the quantity found there, just by pure, simple mathematical calculation, consisted of two and seven-thirty-firsts parts of an ounce, avoirdupois. We will show you that there are approximately four hundred [12] and thirty-seven grains to each ounce, making a total of approximately one thousand grains of this mixture of drugs. We will show you the alkaloid content of this drug found. One package contained approximately 28.3 grams. That package contained 30% heroin. Package No. 2 contained 26.7 grams—these are grams, not grains—also of a potency of 30% heroin. Package No. 3 contained 7.8 grams of heroin, of 18% potency.

We will show you that heroin of 30% potency can be cut by this sugar—the powder that was found there—to any desired strength. In other words, you will receive testimony that 30% mixture is a very powerful mixture, but that generally it is only anywhere between 5% and 10% strength. So that one might, by cutting down the potency of that from 30% to 5% could make six times as many capsules, or about 6,000 capsules.

We will show you that these police officers endeavored to get this defendant's cooperation to disclose the source from

whence he got this quantity of drugs, and who he did business with. And they will tell you that at first it appeared as if he might well cooperate and disclose his source; asking for a little time to think it over. Having, after the finding of the stuff, as I have indicated, unequivocally admitted that he possessed this stuff for the purpose of selling, and for no other purpose—not for his [13] own personal use at all; and that on the 27th day of December—this was on the 21st, and he was brought into the Felony Court here in this building on the 22nd, the following day, because the arrest took place on the afternoon of December 21st—on the 22nd he was brought down into the Felony Court here, and arraigned, and a complaint drawn up. And on the 27th, that is five days after, on an occasion when this defendant, through his counsel, not this gentleman (indicating Mr. Gelb)—not Mr. Gelb—another lawyer that he had in the case—brought a proceeding in the Supreme Court, a writ of habeas corpus—that on that occasion the officer of the Narcotic Squad attended that hearing over in the Supreme Court, spoke to this defendant, and his lawyers were there—I don't say that his lawyer heard, but the lawyer was there because he brought this proceeding. And on that occasion the officer, thinking that he might well have decided to "open up" and disclose the source from whence he received this quantity of drugs, spoke to the defendant. And at that time he said to the officer, "I'm sorry. I can't turn anybody in,"——

Mr. GELB. Now, if your Honor please,——

Mr. LAPPANO (continuing). Indicating——

Mr. GELB. Just a minute.

This is a statement that really is so full of impropriety that I am amazed. I was listening to discover its significance.

[14] The defendant is under no obligation to tell any officer where he got his heroin. No law imposes that on him. No. 1. No. 2: if he refused, that is his business. It has nothing to do with the facts in this case. Because it is conceded that it was heroin; it is conceded he possessed it. The question here is whether or not he possessed it with intent to sell it. Now, how could that be relevant? The fact that he refused to tell the officers where he got the narcotics?

Mr. LAPPANO. I submit, your Honor, that that is all part of the general picture to prove the intent with which he had it.

Mr. GELB. How could it be——

The COURT. Objection sustained.

Mr. GELB. I ask your Honor to instruct the jury to disregard it.

The COURT. You will disregard the statement made that the defendant said he refused to say where he got it.

Mr. LAPPANO. Counsel has repeated now that he possessed,—he knows he possessed this stuff, there is no question about it. I am going to ask you—and I am just finished making my opening statement——

Oh, by the way, I forgot to tell you another thing. A quantity of money was found also in this apartment at the time of the search, $700. And when that was found, this [15] defendant said to the officer, "Why don't you help yourself to that for a Christmas present?" It was after that that the search continued on and on until finally they found this stuff.——

Mr. GELB. That is improper, because they don't allege a crime of attempted bribery in the indictment.

You are stating a collateral matter, charging this defendant with the commission of another crime. It is obviously wrong, isn't it?

The COURT. Objection overruled.

Mr. GELB. You get my point, your Honor?

The COURT. I do.

Mr. GELB. He is stating that the defendant committed the crime of attempted bribery——

The COURT. I will not argue rulings.

Mr. GELB. I except.

The COURT. He is not being charged with an attempt to bribe an officer.

Mr. LAPPANO. Of course not.

The COURT. The jury is entitled to know everything that took place at the time of the arrest.

Mr. LAPPANO. I say in view of counsel's statements several times made to you that he possessed this stuff, and he is guilty of possessing this stuff, addressing himself to the second count

of the indictment,—I say [16] to you, watch and keep your eye on what I perceive to be the mole-hill. This is nothing more. And you will see it as we go along and as the proof develops,—this will be nothing more and nothing less than trying to minimize this situation from a grave one, which it is,—to possess narcotic drugs with intent to sell,—to minimize it to one of mere possession for his personal use. You watch the testimony and see if I am not right.

*Opening statement on behalf of the defendant*

(Thereupon, Mr. Gelb made an opening statement to the jurors, on behalf of the defendant, as follows:)

Mr. GELB. If it please your Honor, ladies and gentlemen of the jury: the loudness of an address carries no greater force than the words contained in the address.

Mr. Lappano starts off here—and I sense from his first few words he spoke, there is a certain amount of temper already pervading his being.

I am not trying to minimize. Possessing narcotics is a crime. He says I'm trying to minimize. I stated, when I selected you, that the defendant possessed narcotics, and he is guilty of a crime, and that he should go to jail. I say now that in interpreting a possession into a possession with intent is a good guessing-game.

I will show you why I say that. It is nothing more than a guessing-game, because you have got to read the man's mind. You have got to find out what was in this man's mind when he possessed narcotics. That is going to be your [17] job. It's a tough one. And you are not going to dispose of a case involving the interpretation of what is in that skull hastily, or in response to hysteria, or in response to oratory. You are going to do it—you are going to do it on the basis of hard reasoning, and on the basis of the application of your common sense.

Now, in the first place, the law says—and it is for convenience—that if a man possesses more than two ounces, there is a presumption he intended to sell it. That law is to make it easier for cops and for District Attorneys.

In other words, it has always been the law that to possess narcotics was a crime. It has always been the law that to sell

narcotics is a crime. It is much easier, when you make possessing with intent to sell punishable in the same way as selling. So it is much easier for cops to achieve their purpose. But under our system of the administration of justice, a jury stands in the way——

Mr. LAPPANO. Your Honor, may I ask——

Mr. GELB (continuing). The jury is the guardian—those are a few preliminary remarks before——

Mr. LAPPANO. Judge, I am going to, respectfully, object to this line. This is not at all a statement by counsel as to what he expects to prove, if anything, on his side. This is a dissertation on the law, and I don't think it belongs here at all.

The COURT. Well, let us hear what he is going to say.

[18] Mr. GELB. I say, under our system you stand as guardians of the liberty of the People. In other words, it is a good thing that there is a powerful force, such as a jury, to say "Wait and see whether the law is being invoked fairly or whether the law is not being invoked fairly."

Now, the defendant possessed more than two ounces—two and seven-thirty-firsts of an ounce,—less than two and a half ounces of narcotics. The police came up to his house, and they searched the place. And before they searched the place, they are going to say that the defendant admittedly was in the racket. In other words, before they found narcotics he admitted he was in the racket. And then when they found the narcotics, the police say the defendant said that was his property, and that selling the stuff was his racket.

Now, I charge—and I hope to be able to prove it through the transparency of the policemen's testimony, through the inherent improbability of the policemen's testimony—that that is not the fact. And the defendant, of course, denies it.

Now, I say, you listen carefully to the policemen when they testify. It is simple as A, B, C. You see, they found narcotics in the defendant's house: therefore, he intended to sell it; therefore, how do you figure he intended to sell it? Well, he made this admission: selling the stuff was his racket.

Now, this defendant is 25 years old, and he will be 26 [19] next month. Up to the age of 15, or over 15, from the time he was an infant, he was always in institutions. He had no home.

He was in various Protectories, growing up without any proper guidance—at least the results would seem to indicate that.

At the age of 16 he engaged in a robbery. He and two other fellows went out, and intended to rob a storekeeper of some money. He was outside, acting as the lookout. He was 16 at the time. And he was caught. And he was permitted to plead guilty to a lesser degree of robbery. And one of the Judges of this Court, ten years ago, placed him on probation. That means he did not go to jail. And a very eminent Judge of this Court thought he was entitled to another chance——

Mr. LAPPANO. Now, your Honor, may I respectfully object to this?

The COURT. All right, objection sustained.

Mr. GELB. May it please your Honor——

The COURT. Please——

Mr. GELB. Wait a minute. I must say this for the record.

May it please your Honor, if I am making an opening, I am outlining what I intend to prove. I intend to prove what I say, and it is relevant.

The COURT. But that an eminent Judge of this Court——

Mr. GELB. Is that what you are objecting to?

The COURT. Thought he had another chance, has no place——

[20] Mr. GELB. Excuse me. I missed the point.

Mr. LAPPANO. I did not object on that ground at all.

The COURT. Not that I am taking any objection to the eminence——

Mr. LAPPANO. Not on the eminence. Of course not. I don't think it is proper——

Mr. GELB. Do you want to object on that ground?

Mr. LAPPANO. I don't object on that ground, your Honor. I object on the ground that Mr. Gelb's statement at this time to the jury is not proper.

The COURT. Please proceed.

Mr. GELB. All right.

At any rate, he was put on probation. A short time later he committed a burglary. This time he went to jail.

When he got out of jail—I think he served 15 months—he was arrested again for violating parole. I think he was in a stolen automobile.

From the age of 16 up to December, 1950, the defendant has done very little legitimate work. What could be fairer than for me to tell you just what you are facing, who this defendant is?

Now, that means that this defendant certainly knew that an admission to a police officer that you committed a crime——

Mr. LAPPANO. I must respectfully object at this time.

[21] The COURT. Objection sustained.

Mr. GELB. At any rate, I will ask you to consider, in the light of the defendant's background, when you listen to the policemen, whether or not he made any such admissions. That is the reason I am telling you something about the background of this defendant.

Now, Mr. Lappano outlined to you the way two and two-fifths, let us say, ounces of narcotics could be divided and subdivided, and I got lost there. I lost some of that, until he wound up with 6,000 capsules. Now, there is a lot of guess-work about that, and I want you to keep that in mind: a tremendous amount of guess-work! I don't think I have met two persons who have worked in the field of narcotics who will agree.

Mr. LAPPANO. Your Honor, may I respectfully object to that?

Mr. GELB. That I too will expect to prove.

Mr. LAPPANO. What Mr. Gelb has found on his own, is not proper.

Mr. GELB. All right.

The COURT. All right, objection sustained.

Mr. GELB. The man was a user of narcotics. He smoked marijuana five years ago. He sniffed heroin for at least two and a half years. He is a user of narcotics. He's a cripple. He goes out to the park. He leaves his house. And he can't [22] refrain from using narcotics when he's out. He puts some in an envelope. He puts staples on it so that it wouldn't spill out; so that when he is outside, he hides himself some-

where, goes into a toilet in a saloon, or any place else, and sniffs heroin.

Now, you are going to be asked to conclude the possession of the stapler, the possession of envelopes, possession of a little scale to help him mix part of pure heroin with milk sugar into a formula, or into a two and a half ounce or similar quantity of a mixture that he can take—I say that you are going to be asked to guess your way into finding this defendant guilty of intent to sell.

Now, I want you to listen carefully. And it is, I think it is a healthy thing for any human being to keep a healthy skepticism in his make-up, to have that trait in his make-up, and to exercise it when listening to testimony in a courtroom.

Mr. LAPPANO. At this time, your Honor, may I respectfully ask that witnesses—all witnesses—be excluded?

The COURT. All witnesses on both sides will remain out of the courtroom until called.

Mr. LAPPANO. Except Officer O'Brien, the first witness.

(The witnesses were duly excluded from the courtroom.)

[23] Thomas W. O'Brien, Detective, Shield No. 234, attached to the Narcotic Squad, New York City Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. LAPPANO:

Q. Officer O'Brien, how long are you a member of the Police Department of the City of New York?—A. I was appointed on December 19, 1945.

Q. That means you have been a member of the Police Department for five years completely, is that right?—A. Yes.

Q. And how long have you been a member of the Narcotic Squad of the Police Department of the City of New York?—A. From February 1st, 1946.

Q. That will be four years this February?—A. Tomorrow.

Q. Now, Officer O'Brien, do you recall December 21st, 1950?—A. I do.

Q. On that date did you have occasion to go to premises 527 West 134th Street, in the County of New York, apartment 12 in that building?—A. I did.

Q. Who, if anyone, did you go there with?—A. I was accompanied by my partner, Detective Mandel Schein.

Q. Mandel Schein?—A. Yes, sir.

Q. By the way, where is Mandel Schein now, if you know?—A. Detective Schein is officially on sick report, [24] and is at present confined to Mt. Sinai Hospital.

Q. He is presently at Mt. Sinai Hospital?—A. Yes, sir.

Q. Did you see him there?

Mr. GELB. Do you intend to call Schein, or don't you?

Mr. LAPPANO. I am just explaining——

Mr. GELB. You could have postponed the case, if you want him.

Mr. LAPPANO. I don't need him. I am going ahead with this——

Mr. GELB. Then this is irrelevant. It is improper.

The COURT. Objection overruled.

Mr. GELB. Exception.

Q. Did you see Detective Mandel Schein at the hospital?—A. I did, yesterday.

Q. You saw him there yesterday?—A. Yes, sir.

Q. Now, you went there with Detective Mandel Schein?—A. Yes, sir.

Q. Will you tell his Honor and the jury about what time it was?—A. It was shortly after noon, probably about 12:15 P.M.

Q. What floor is this apartment on?—A. It's two flights up.

Q. When you reached this apartment, was the door to it open or closed?—A. The door just opened as we entered [25] there.

Q. Did anyone come out?—A. Yes, sir, a painter.

Q. A painter?—A. Yes, sir.

Q. Did you and Detective Schein enter that apartment?—A. Yes, sir.

Q. As you entered that apartment, what is the first room that you come into?—A. As you enter on your right is the kitchen.

Q. Well, do you step right into a room, or do you step into a foyer, or hall, or what?—A. No, it is a foyer. And I would say from the front door, several feet, there is an entrance into the kitchen, on the right. In other words, you walk straight down the hall, and the rooms offshoot them. Right to your right, the first door you would meet would be the kitchen.

Q. Which room did you enter when you first came into the apartment?—A. I walked a few steps in the foyer, and I turned,

and I observed George Angelet seated at a table in the kitchen.

Q. In the kitchen?—A. Yes, sir.

Q. Was there anybody else there with him at that time?—A. There was on old woman there.

Q. Anybody else?—A. That's all.—No.

Q. In that room?—A. In that room, yes, sir.

Q. Did Detective Schein enter that same room with [26] you?—A. Yes, sir.

Q. Now, Officer O'Brien, would you describe the apartment as best you can recall it?—A. As you enter the doorway, you walk several feet, and then there is a door off, and that is the kitchen. And that foyer that you walk into continues, and it opens into a living room.—No. Several feet from the kitchen there is a bathroom, right on your right, right adjoining the kitchen. And several feet from that, you enter the living room proper. And then from the living room proper you walk right into the bedroom, the first bedroom, and right off that bedroom to your right is another bedroom.

Mr. GELB. Your Honor, may I approach the bench with Mr. Lappano for just a moment?

The COURT. Surely.

(Counsel on both sides conferred with the Court at the bench.)

Q. You say that you saw the defendant George Angelet was at a table in the kitchen there? Is that correct?—A. Yes, sir.

Q. Now, suppose you tell his Honor and the jury what you said to him, if anything, and what he said to you; and what you did, what Schein did in your presence, what Schein said in your presence, to the defendant, and what the defendant said to you. Tell us the whole story, that is as best you [27] can recall it. What happened after you got there.—A. Well, I walked into the kitchen first. Detective Schein was behind me. I said "Hello, George" to the defendant. He said "Hello." I said "I hear you have a load of stuff up here, and a gun." He said "Someone is kidding you. Someone is giving you a bad time." I said "No, not this particular time. This time we're pretty definite. And if you do have any narcotics here, or if you do have a gun, you will save yourself a lot of trouble by giving it to us right now." He said "No, someone is kidding you. I

don't have anything here." I said "If you have it, you might as well give it to us because we're going to look for it, and we'll eventually find it." He said "I don't have anything." So I said "Would you mind coming up and going into the bedroom?" He said "No. Come on." He got up from the table. He walked first. He walked us through the living room and into the first bedroom. And I said to him "Do you sleep here?" And he said "No. That's my room there", and indicated the bedroom on the right. I looked around the place. I said, "It seems to be in an awful mess." There was baskets piled up with materials. He said "The painters are here, and the place is being repainted, and everything is packed in those particular baskets."

I then said "You sit here in the bedroom, and we're going to start right here. We'll search right from here."

[28] He sat down, and he said "You're only wasting your time."

I then said to Detective Schein "I'll start against the wall and start searching." I started on a couple of baskets that was silverware wrapped up in it and glasses. I then searched a—I call it a chifferobe. It was a portable—or it seemed to be a temporary affair, that had clothing in the top, suits that would fit, and there was quite a number of clothes in there. I searched through all the clothes. And there was shoes in the bottom. And I searched through all the shoes.

Then there was several other baskets. And then against the wall, facing the street, was a dresser. And every once in a while while I was searching I would turn around and make some remark to the defendant. And in the interim I noticed that Detective Schein would walk outside, and walk inside, and talk to different people including his wife. As I opened up the——

Q. You say "different people". What other people were there then?—A. Well, his wife was there. And there was several young children that were running in and out the door. And there was a dog. A dog was barking.

Q. All right.—A. I opened up the top dresser drawer, and as I did I observed that there was a quantity of loose money on top. I said to him "You seem to have a lot of money here,

George." He said, "Yeah, yeah. It's all right," he said. "Incidentally", he said, "You know it's near Christmas. [29] Why don't you take care of yourself?" I said "What are you talking about? The money here?" He said "Yeah." I said "You are not asking me to take any of that money? You are not worried, are you?" He said "No, I just figured that maybe you would take some and get out of here, and save me some trouble. After all, save me the trouble of your barging in again." I said "You just keep your eye on the money, and before we leave, we'll take it out and you'll count it."

I then went to the next drawer, and I pulled it open. And as I did, I observed a quantity of cellophane, or cellulose, envelopes. I took the envelopes out. I said to him, "What about these, George? What do you use them for?"

Q. Was Detective Schein present then?—A. Yes. Detective Schein was in the room.

Q. Go ahead.—A. "What do you have these for?" "Well", he said, "You know. That's when I used to be in the racket. But I don't have any use for them any more."

Q. Officer, do you have those cellophane envelopes with you now?—A. Yes, I do.

Q. Will you produce them, please?—A. Yes, sir. (Producing package of cellophane envelopes, and handing same to Mr. Lappano.)

Q. The envelopes which you have just handed me, I hold in my hands. Now, you say you found these very envelopes in this drawer?—A. Yes, sir.

Q. And you were talking to the defendant about these [30] very same envelopes?—A. Yes, sir. I held them in my hand, and showed them to him.

*Offers in evidence*

Mr. LAPPANO. I offer these in evidence.

Mr. GELB. No objection.

(The cellophane envelopes, being 54 in number, were received in evidence and marked People's Exhibit No. 1 in evidence.)

Mr. LAPPANO. Your Honor, People's Exhibit 1, consisting of 54 envelopes.

The COURT. All right.

Q. Will you please tell us again what was it you said to the defendant about those envelopes, and what did he say to you?—A. I picked the envelopes out of the drawer. I showed them to the defendant. I said to him, "What about these, George?" 'What are yout using these for? What do you have them around for?" "Oh," he said, "They were when I used to be in the racket, I had them then. But", he said, "I have no use for them now," or "no further use." He said "It's just one of those things. I just let them stay there. I just didn't bother to get rid of them. Besides, the place is all upset, and I didn't bother to get rid of them, but I have no further use" or "I have no use for them now."

Q. You say he said "When I was in the racket". What racket, if any, were you talking about?

Mr. GELB. That is a conclusion.

[31] Q. Well, was there any talk about the racket? What racket?—A. Yes. When I first came, I was discussing the racket, and I had told him that I was looking for "junk", and I was looking for a gun, and he said—in the beginning he had said "Oh, no, I am out of the racket completely, the junk racket."

Q. Is there any question at all that you were talking about the selling of narcotics racket? Was there any question at all that that was what you were talking about to him?—A. No. He definitely understood what I was talking about. He knew what I was talking about.

Q. And he said, in substance, that he had it from before?—A. That's right, when he was in the racket.

Q. That he was out of it now?—A. He was out of it completely now.

Q. Then what else did you find, and where?—A. Right in the same drawer I found a quantity of empty capsules. And these particular capsules happened to be in a cocktail glass which, when I was holding up to show him, I dropped the glass. But these are the capsules that were in there [handing package to Mr. Lappano].

Q. These have been sealed into this package. Was it signed by you, or marked by you, or what?—A. No. I put my initials on it.

Q. Those were the ones that were turned over to the [32] chemist for examination, is that right?—A. No, sir, these are empty capsules.

Q. These are empty capsules?—A. Yes.

Mr. LAPPANO. May we open those then without disturbing the evidentiary value of them?

(The witness opens the package and pours the empty capsules into an envelope.)

Mr. LAPPANO. Mr. Gelb, do you want to watch this at all?

Mr. GELB. What is that?

Mr. LAPPANO. I want to count them.

Mr. GELB. No, I don't want to count them.

(Mr. Lappano counts the empty capsules.)

Mr. LAPPANO. They were counted, your Honor. There are 106 empty capsules.

Q. Now, with respect to these 106 empty capsules, did you say anything to the defendant about them, and did he say anything to you?—A. Yes, sir. I turned around to the defendant, and I said "How about these, George?" He said "It's the same thing"——

Mr. GELB. Nobody can hear him.

Q. A little louder.—A. I turned around to the defendant, and showed him the empty capsules. I said "How about these, George? He said, "Well, that's the same thing. They are just laying there. I didn't just bother [33] to get rid of them. But that is from previous", he said. "It has nothing to do with now."

Mr. LAPPANO. I offer these in evidence, your Honor.

Mr. GELB. No objection.

The COURT. Mark them in evidence.

(The 106 empty capsules, above referred to, were received in evidence and marked People's Exhibit No. 2 in evidence.)

Q. Did you find anything else?—A. Yes, sir. Then I found this stapling machine. (Handing to Mr. Lappano.)

Q. Did you talk to him about that?—A. Yes, sir. I turned to him, and I said "George, how about this?" He said "It's just one of those things. It's around the house." I said "Yes, but when you put them all together, it looks bad, especially for

you." He said "It's one of those things. It was just there, and I just let it lay there. That's all."

I then found these staples. I said, "George, how about the staples?" He said "Well, they go with the machine." I said yes, it all seemed to go together. "You couldn't get rid of any of it?" "No," he said "I just allowed it to lay around."

Q. Did he ever tell you what, if anything, he used them for before?—A. He said he had previously used the envelopes and all this paraphernalia when he was in the racket, he said, but now he had no further use for it and he [34] was just letting it lay there, that's all.

Mr. LAPPANO. Your Honor, I offer in evidence the stapling machine as an exhibit. And as a separate exhibit the little box of staples.

Mr. GELB. No objection.

(The stapling machine above referred to was received in evidence and marked People's Exhibit No. 3 in evidence.)

(The box of staples above referred to was received in evidence and marked People's Exhibit No. 4 in evidence.)

Q. Officer, did you find anything else?

Mr. GELB. Excuse me. He started to say he found the envelopes in a drawer, but he didn't say where he found the other stuff.

Mr. LAPPANO. I thought he said the same drawer.

Q. Was it the same drawer, Officer?—A. Yes, sir.

Mr. GELB. All right.

Q. If you find any of these things you are talking about in any different place, will you tell us, please?—A. Yes, sir.

Q. Go ahead, please. What else did you find?—A. In the same drawer I found this scale [producing scale].

Q. Did you talk to the defendant concerning this scale?—A. Yes. I said "This is the first time I have ever seen this type of scale. And what do you use that for?" He said "Oh, I had that when I was in the racket," he said "and [35] it's used to measure an ounce." I said "Well, how do you—how does it work? How does it operate?" And he took it, and he held it—[illustrating]—and he took it, and he held it up, and he said that "you, in order to measure an ounce, you clip the object on this side" [indicating] and I am not sure how he did it, but he

showed me how to do it. I told him I had never seen a scale of that type.

Q. Are you sure, though, that he had told you he had had it and he used to measure narcotics when he was in the racket?—A. Yes. That is what he used to measure narcotics, he said. I said "What do you have that hanging around for?" He said, "It's the same thing. I didn't get rid of it." He said "It's there, and it's there. I didn't bother."

Mr. LAPPANO. I offer it in evidence at this time.

Mr. GELB. No objection.

The COURT. Mark it in evidence.

(The scale above referred to was received in evidence and marked People's Exhibit No. 5 in evidence.)

Mr. LAPPANO. May I show this to the jury, your Honor?

The COURT. Yes.

(Mr. Lappano hands People's Exhibit 5 to the jurors, who examine the same.)

Q. What, if anything else, did you find?—A. Well, right about that time I turned around—I heard someone at [36] the door, and I turned around——

The COURT. A little louder.

A. I heard someone at the door, and Detective Schein said "Just a minute." And he walked out, and he returned about a short time later, and he was accompanied by Agent Benjamin Fitzgerald of the United States Federal Narcotic Bureau.

Q. Did you call Agent Fitzgerald to the premises?—A. No, sir.

Q. Do you know whether Detective Schein called him?—A. Yes, Detective Schein.

Q. How did he call him, if you know?—A. Between the bedroom on the right, which we were in, and the other bedroom is—actually it is open, and there is a small desk there, and the telephone is right there.

Q. In other words, he used that telephone?—A. Yes, sir.

Q. You say Detective Schein went to the door and allowed Federal Narcotic Agent Benjamin Fitzgerald in?—A. Yes, sir.

Q. Now, up to the time of the arrival of Agent Fitzgerald, are these the things that you had found, that are now in evidence?—A. Yes, sir.

Q. Now, after Agent Fitzgerald came, was anything else found?—A. We told Agent Fitzgerald what we were doing, and how far we had gone, and introduced him to George.

[37] Mr. GELB. I didn't hear that last.

Mr. LAPPANO. "Introduced him to George."

A (continuing). Introduced him to George. And Agent Fitzgerald said—I heard him say: "Do you mind if I look around?" And a short time later he said, "Look at this". And he picked up a hat that was on top of a dresser. He held this hat up——

Q. Who did this?—A. Agent Fitzgerald. He said "Look at this." And when I looked, I observed these four packages [producing packages]—these four packages here [indicating four packages] under the hat.

Q. You mean these packages themselves, or the contents of these packages?—A. The contents of these packages. They were wrapped in this cellophane.

Q. They were cellophane envelopes?—A. Yes, sir, containing——

Q. With some stuff in it?—A. Containing a white powder. It was whitish inside.

Q. How many packages were there? Envelopes?—A. There was four.

Q. Four envelopes?—A. Yes, sir.

Q. Now, Agent Fitzgerald said "Look at this".—A. Yes, sir.

Q. Where was Angelet at that time?—A. He was seated on the bed.

Q. In the same room?—A. Yes, sir, and facing us. He was watching us while we were searching.

[38] Mr. GELB. What room are we talking about?

Q. The bedroom?—A. Yes, sir.

Mr. GELB. There are two bedrooms. Which room?

The WITNESS. The right bedroom; or, as you came in, the bedroom on your right.

Q. Do you known whether that was the bedroom of the defendant? Did he say it was his bedroom?—A. Yes, he brought us in there and said that it was his bedroom.

Q. He said that was his bedroom? Go ahead.—A. So I picked up one of these packages—I picked up this package [indicating package]——

Q. That you are now holding in your hand?—A. Yes, sir. I turned to the defendant Angelet, George Angelet, and I said "George, how about this?" He said "All right. You got it." "So we got it. We got what?" "You got all the stuff", he said, "You got the stuff. What more do you want?" I said, "How about this package? What's in it?" He said, "This is H".

The COURT. This is what?

The WITNESS. "This is H." I said, "What do you mean by H?" He said "It's heroin." I said, "About how much is in this package? Or what do you call this package? What do you sell them at?" He said, "That's one ounce." I said, "One ounce of heroin?" He said, "Yes."

Mr. LAPPANO. May we at this time mark this for identification, your Honor?

[39] The COURT. Yes.

(Cellophane package containing white powder was marked People's Exhibit 6 for Indentification.)

Q. Will you continue?—A. I then picked up this package here. (Holding another package.) I said "George, how about this one?" He said, "That's the same thing." I said, "What do you mean the same thing?" "Well," he said, "That's heroin too. And that's an ounce."

Mr. LAPPANO. May we mark this for identification, your Honor?

The COURT. Yes.

(A cellophane package containing white powder was marked People's Exhibit No. 7 for identification.)

Q. Will you proceed, Officer?—A. I then held up this packages [Holding up package]. I said, "George, what about this one?" He said, "That's the same thing, too." I said, "What do you mean the same thing?" He said, "Well, that's heroin." I said, "How much is in this package?" He said, "Let me see it." And I then handed it to him. And he held it up. "Well", he said, "I would say it is about one-half." I said, "In other words, it is about one-half ounce of heroin?" He said, "Yes, it's about that", he said.

Mr. LAPPANO. May we mark this for identification?

(Cellophane package containing white power was marked People's Exhibit 8 for Identification.)

Q. Proceed, please.—A. I then showed him this package [40] [Holding up another package]. I said "George, what about this package? What is in there? The same thing?" He said "Let me see." He took them, he looked at them. He said——

Mr. GELB. Is this the third package?

Mr. LAPPANO. This is the fourth package.

Mr. GELB. Oh, I see. Excuse me.

The COURT. Go ahead.

A. I showed him this package. He said, "Let me see it." And he took this package, and he held it up, and he said "Oh, there's caps in there. That's C." I said "What do you mean C?" He said, "Well, that's cocaine. That's in capsules." I said, "How many caps do you have in there?" He said, "Oh, I dont know. Let's see a minute." I took the cellophane envelope—I opened it, and I counted the capsules in my hand in front of him. I said, "There is 18 caps. Right?" He said, "Right, 18." I said, "How do you know this is cocaine, George?" He said, "What the Hell! I ought to know." I said, "Well, how do you know?" "Well", he said, "I have been in this racket long enough to know." I said, "How long a run have you got?" He said, "Well, what's the difference? A couple of years." I said, "How can you tell the difference between these different packages? It's hard to distinguish, isn't it? Sometimes you can get them mixed up. You don't happen to take this [41] stuff, do you?" He said, "What the Hell do you think? I'm crazy?"

Mr. LAPPANO. May we mark this for identification?

(Package of capsules above referred to was marked People's Exhibit 9 for identification.)

The COURT. Members of the jury: you are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you. Those

are the instructions that I told you that I would have to repeat at each adjournment or recess. Please return at 2:15.

(Trial resumed after noon recess.)

Detective Thomas W. O'Brien, resumed the stand.

Mr. LAPPANO. Your Honor, may I respectfully ask that the last two or three questions and answers be read so that we may continue from that point where we left off?

(The last few questions and answers were read as recorded.)

By Mr. LAPPANO (continuing).

Q. Will you continue from that point on, Officer? You have the exhibits there, exhibit 9. Will you continue [42] from that point on?

Mr. GELB. This is after what they found what he called H and C?

Mr. LAPPANO. Yes.

Mr. GELB. There is no point going before that. This is after they found that. He is questioning the defendant?

Mr. LAPPANO. That's right.

Mr. GELB. There is no point in reading before that.

Mr. LAPPANO. No, I don't want before that.

The WITNESS. I got to the cocaine, though; right?

Mr. LAPPANO. Yes.

Mr. GELB. Yes.

The WITNESS. Right at that particular time Agent Fitzgerald took something out of the drawer, and he said, "How about this?" And he took out this jug (producing and indicating).

Q. Mug? We call it a mug.—A. Mug.

The COURT. Mug or jug.

The WITNESS (continuing). And it contained a white powder.

Q. That is Agent Fitzgerald that picked that from where?—A. From out of the drawer, and he handed it to me.

The COURT. The same drawer where you had the heroin and the cocaine?

The WITNESS. No.

Mr. LAPPANO. No. The heroin and cocaine were on a [43] dresser, under a hat.

The COURT. The same drawer where you had the envelopes?

The WITNESS. Where he took it from, I don't know. But he took this and handed it to me.

Q. Then when you got it in your hands, what did you say to the defendant?—A. I looked into it. It contained a white powder. And I said, "How about this, George?" He looked at it, and said, "It's milk sugar." I said, "What do you use that for?" He said, "You know what that's for." I said, "What do you use it for?" "Well," he said, "They use it to cut the stuff." I said, "Do you use it to cut the stuff?" He said, "No, they use it to cut the stuff." I said, "Who do you mean, they?" He said, "It's used to cut stuff." I then said to him, "Listen, George, let me get this straight. Is this your bedroom that you live in, or that you sleep in?" He said, "Yes, this is my bedroom." "How come you have this particular bedroom?" "Well," he said, "Since the accident I have to sleep on a hard bed." So I said, "How about all this stuff? Does all this stuff belong to you?" He said "Yes." I said, "How about your wife? Does she know about this?" He said, "No, she don't know about anything."

I said, "What do you do for a living when you work? What's your occupation?" He said, "What's that for?" [44] "Well," I said, "That's part of the pedigree. What do you do for a living?" He said, "I'm a printer." I said, "You're a printer? When was the last time that you done any printing work?" "Well," he said, "I just gave that as an occupation." He said, "That's something that I picked up in a Home I was in." "Well," I said, "when was the last time that you worked?" "Well," he said, "before I had the accident I could not get a job. And now that I have had the accident, my arm is paralyzed and I can't work." "Well," I said, "How do you support yourself? What do you do to support yourself?" "Well," he said, "well, you ought to know what I do." I said, "How about your family—your wife? What do you tell them you do? I mean, how can you keep an apartment like this, and have children, and support yourself? What actually do you do?" "Well," he said, "I tell my wife that I gamble." I said, "For this long a period of time that you gamble? You must be a lucky guy." "Well," he said, "I tell her that, and that's what she believes." He said, "She really don't know nothing." He said, "In fact, do me a favor, don't tell her nothing about this. If she asked you something, tell

her it's a gambling pinch." I said, "I can't do a thing like that." So I said, "George, there is only one way you can help yourself. There is only just this one way. I can't promise you anything. If you want to help yourself, you'll have to tell us who your [45] source of supply is, and you'll have to help us to get someone that's bigger than yourself." I said, "I can't promise you anything whatsoever, but I do promise you this: that if you cooperate with us, we'll do everything we can do to help you. That I personally will bring you down to the District Attorney's Office. You can tell him the story, and from then on, you can work it out for yourself. But that is the only possible way you can help yourself. Now, who is your source of supply?" "Oh," he said, "What's the difference" he said. "I have had a—oh, I am not putting a finger on anybody. I have had a long run out of this. No one has put the finger on me, and why should I put the finger on somebody else? And I don't believe in being a stool pigeon." "Well," I said, "it's for your own good." I said, "I might as well tell you this, and I am telling you point blank: you're going to be charged with the possession of all these narcotics. And under this new law, it's a felony. And do you know what that means?" And he said, "Yes." I said, "You stand to do a long time. Do you realize that?" He said, "Yes." So I said, "The only way that you can help yourself is to help us." He said, "What do you want me to do? What else can I do? Who can I give you except my brothers?" "Well," I said, "I don't expect you to turn up your brother, but there must be other fellows you know—there must be somebody else bigger in this outfit, that you [46] can help us on." He said, "The only other fellows that I know would have to be fellows on ships. How about that?" I said, "Gee, that would be swell, if we could work that out. That is, if you would be willing to cooperate 100% with us." "Well," he said, "That is the only thing I can do. It would have to be fellows on ships." I said, "Would you be willing to do that for us?" "Well," he said, "I can't say anything right now. You will have to give me time to think it over." I said, "How much time would you want? Because, after all, I have to notify someone." "Well," he said, "Give me a couple of days." He said, "I know that if I get in today,

I'll get bailed out, and you give me your 'phone number and I'll call you up. And then I'll tell you exactly what I want to do." So I said, "I found out in the past that don't work too good. I would rather you give me some inkling of what you intend to do right now. Tell me the particular line, or tell me a certain person or name, someone that I know, or show me in some way that you mean to do what you say you are going to do." "No," he said, "you'll have to give me a couple of days." He said, "I'll call you that way. That is, if I get out on bail." I said, "supposing you don't get out on bail?" "Then," he said, "I'll get in touch with you anyhow. Within several days I'll get in touch with you, and then I'll see." I then said to him, "All right."

[47] Mr. GELB. If your Honor please, the Officer is giving a long conversation concerning the turning up of a source of supply. Now, if a man buys narcotics for his own use, or he buys it to sell, it doesn't make a particle of difference. This conversation, I mean, has no relevancy——

Mr. LAPPANO. It is all part of the picture, if your Honor please——

Mr. GELB. Wait a minute.

The COURT. Is that an objection?

Mr. GELB. I want to give a reason for my objection. An objection sometimes is clouded when there is no reason given.

The COURT. I can't tell until I hear the entire conversation.

Mr. GELB. All right.

Q. Go ahead.

The COURT. At this time I will overrule the objection.

Mr. GELB. All right.

Q. Go ahead, Officer.

The COURT. Go ahead.

Q. I then said, "All right, George, you're under arrest. You better get dressed, and put your clothes on." He started to get his clothes, and right at that particular moment his wife was attempting to get into the room on several occasions. Finally she came into the room. He said to her, "all right, [48] honey, I'm going but I'll be all right."

He started to put his clothes on. Finally he said to me, "Don't let her stay around. Tell her that she has to get outside." Detective Schein took his wife and brought her outside and said that she could not be present. He said, "What do you say? Just tell her that it's a gambling pinch," he said. "Tell her that it's nothing to it, and don't worry and upset her, and," he said, "do me a favor." I said, "I can't. That's up to you to decide as to what to tell her. But if she asks me, I will have to tell her exactly what you are being charged with. So if you don't want her to know about it, then you better yourself go out and tell her exactly what you want to tell her."

By that time he had got dressed. He walked outside, and he said, "Come on, let's go."—He walked outside. His wife was crying then. She said, "You are not going to take him unless I know what he is being taken for." I finally turned to him, and I looked at him. He said nothing. He just said to her, "Oh, come on, keep quite. Don't go on like that." She insisted she wanted to know what he was being arrested for. I finally said to her, "He's being arrested for the possession of three packages containing heroin and a package containing capsules of cocaine. He is being arrested for an amount that is over two ounces, on what he says, which is a felony. And he is being arrested as a seller of narcotics. He is selling junk. Do you know anything about those ac- [49] tivities?" She said "No." She said, "George, say it isn't true." He just put his head down, and said, "Come on. Let us go."

Mr. LAPPANO. May we mark this jug and its contents for identification at this time?

(Jug and contents, above referred to, marked People's Exhibit 10 for Identification.)

Q. Can you approximate the time that you left the apartment with the defendant in custody?—A. Approximately 1:30.

Q. And who, if anyone, left with you and the defendant?—A. Detective Mandel Schein and myself, and one of the—we went in Detective Schein's car, and the Federal Agent came down to the street with us, and he said he would follow us to the precinct.

Q. So that there were four of you? Is that correct? That left the apartment together?—A. Yes, that's right.

Q. The defendant, Detective———A. Mandel Schein.

Q. Mandel Schein?—A. Myself.

Q. And Federal Agent Benjamin Fitzgerald, and yourself. Is that right?—A. Yes, sir.

Q. Did you go directly to the station house?—A. Yes, sir.

Q. Which station house?—A. The 32nd Precinct. That's on Amsterdam Avenue.

Q. How far is that from the West 134th Street—the defendant's home?—A. Well, it's about three blocks.

[50] Q. Just about three blocks?—A. 35th and Amsterdam.

Q. Was there any talk at all, that you remember, on the way to the station house between you and the defendant?—A. On the way to the station house, I still questioned him about his source of supply. I questioned him about his source of supply and the fact that his cooperation——

Q. What did he say, if anything———A. Well——

Q. At that time?—A. I told him again that——

The COURT. No. What did he say?

A. He said at the time "Give me a few days. I have to think this out", he said.

Q. Well, he repeated what he said before, that he wanted a couple of days?—A. Yes, sir.

Q. You got to the station house?—A. Yes, sir.

Q. Did Agent Fitzgerald come into the station house, do you recall?—A. I don't remember him coming into the station house.

Q. Detective Schein came in?—A. Yes, sir.

Q. And the defendant?—A. Yes, sir.

Q. Was there any more conversation that you recall?—A. Well, right at that particular time I kept him beside me while I booked him—and I booked him in the precinct, and I gave his pedigree. And I questioned him about his pedigree, where he lived——

The COURT. Anything else, outside of booking him?

[51] The WITNESS. No, sir. Then we went out to the car.

Q. All right. Now, after you booked him——

The COURT. For the information of the jury: when I used the term "anything else outside of booking him", it merely means this: in the station house there is a sergeant who has

a book, a register, where he puts down the person who is being locked up, who locked him up, what he is being locked up for. And because it is put in a book, and a record made, we get to use the expression "booking". It means entering it in a book.

Q. Now, after the booking, did you go somewhere?—A. Yes. We went—then we went down to Police Headquarters in order to fingerprint him and photograph him.

Q. Did you have with you at the time these packages and this paraphernalia [indicating exhibits]?—A. Yes, sir, I did.

Q. Now, specifically referring to People's Exhibit 6 for identification, a package of white powder [handing to witness]. Did you have that with you?—A. Yes, sir, I did.

Q. And did you deliver that to Police Headquarters for the purpose of having it inspected, or analyzed, by the Chemical Laboratory of the Police Department?—A. Yes.

Q. And at the time that you delivered it there, did you seal it?—A. I did. Yes, sir.

[52] Q. Does this package which I hold in my hand, People's Exhibit 1 for identification, contain——

Mr. GELB. Mr. Lappano, I am sure the back jurors wouldn't hear what is going on.

The COURT. All right, will you please read the last few questions and answers?

Mr. LAPPANO (addressing jurors). Can you hear what I said?

The JURORS. Yes.

Mr. LAPPANO. Thank you.

The COURT. You better step a little further away.

Mr. LAPPANO. Yes [stepping back].

The COURT. Let the Stenographer read the last three or four questions and answers.

(The last few questions and answers were read as recorded.)

The WITNESS. I will have to clarify myself at this point. The package that you are holding in your hand is sealed in front of the desk officer. Each individual package is sealed in front of the desk officer. In other words, I take a brown sticking paper, which you see through the middle, and I have to wrap it around, and mark it in front of the desk officer.

Q. And you did that on this package?—A. Yes.

Mr. GELB. Excuse me a minute.

[53] You are trying to show that all those packages were examined by a chemist?

Mr. LAPPANO. Yes.

Mr. GELB. Right?

Mr. LAPPANO. Yes.

Mr. GELB. You can dispense with the technical proof.

Mr. LAPPANO. All right, if you say so.

Mr. GELB. I mean the chemist will testify that he examined the packages this witness says he took from this house?

Mr. LAPPANO. All right.

Q. So that you delivered the packages in People's Exhibits 6, 7, 8 and 9 for identification, to the Police Laboratory, together with the contents in there, for the purpose of inspection and analysis by the chemical laboratory. Is that correct?—A. Yes, sir.

Q. And those are the same packages that you took out of the house of the defendant, George Angelet?—A. Yes, sir.

Q. With the contents intact?—A. Yes, sir.

Q. Is that correct?—A. Yes, sir.

Q. Now, I don't think you told us about that $700. Before you left the apartment, was anything done with that $700?—A. Yes, sir. When the prisoner was getting dressed, Detective Schein came into the room and said, "Is he almost ready?" And I said, "Yes." He said, "All right, George. Now, you get up, walk over to that dresser, you [54] take that money out, make sure it's all there, and hand it to your wife before we leave. And before we leave, you tell me whether it's all there or not." And he went over, counted the money, and right before he left, when he put his topcoat on, as he was going to the door, he handed the money to his wife. Manny said—Detective Schein said to him, "How much money did you have there?" He said, "Oh, it's around $700."

Q. Officer O'Brien, during the almost two years that you have been a member of the Narcotic Squad, approximately how many arrests have you made of sellers and users of narcotic drugs?—A. In the four years that I have been attached to the Narcotic Squad, I would say that I have made approximately—a conservative estimate of over 200 arrests; and that 95% of

the arrests would be sellers, which is the object of our particular bureau.

Q. And in those cases where you made these arrests, did you thereafter testify in the courts concerning those arrests?—A. Yes, sir, I did. I testified in court on many occasions.

Q. And did you testify in cases where there were convictions based on your testimony given there in connection with those arrests?—A. Yes, sir, I have.

Q. Now, in making these arrests, did you experience the finding of paraphernalia and articles that are used—[55] commonly used—in connection with the sale of narcotic drugs?

Mr. GELB. Wait a minute. Wait a minute. It is an ambiguous question. I object to it.

Mr. LAPPANO. May we have it read?

The COURT. Read the question.

(The question was read as recorded.)

Mr. GELB. "Experience the finding of articles". What does that mean?

The COURT. Read that again.

Mr. LAPPANO. May I rephrase it?

The COURT. Yes.

Q. In your experience, about which you have just testified, referring to the cases where sales of narcotics were involved, did you become acquainted with articles or things that are used by the sellers of narcotics in connection with preparing the articles for sale?

Mr. GELB. I object to that. That is not the subject of expert proof.

In other words, instead of asking "When you arrested a seller of narcotics did you find a stapling machine, did you find envelopes, did you find a scale"—that is what he really is asking him.

Mr. LAPPANO. That will follow.

Mr. GELB. That is what you mean to ask him. And I [56] say that is not the subject of expert proof. And supposing he did find?

The COURT. I will overrule the objection.

Mr. GELB. Exception.

Q. Did you, Officer?—A. The——

Q. Just yes or no, first.—A. Yes.

Q. Now——

Mr. GELB. If your Honor please, may I add something else to that objection?

The COURT. Yes.

Mr. GELB. The question is so broad and general. "Did you find?" Undoubtedly arrests were made of sellers where he found nothing. Now, it seems to me, to set this—to put this into a scientific setting, or make it sound like expert proof, is ignoring the true state of facts. It doesn't lend itself to such analysis.

The COURT. I don't know.

Mr. GELB. Well, I am stating——

The COURT. I say I have had no experience in that line.

Mr. GELB. I am stating—he hasn't laid a foundation to show that there is a pattern that fits.

By the COURT.

Q. Is there a pattern used by sellers of narcotics as to the articles used in connection with the sale of narcotics?—A. Yes, your Honor.

[57] Q. And you have found that from your experience?—A. Yes, your Honor.

Q. And what is that pattern, as you have found it?—A. Well, starting off, as far as users of narcotics——

Q. No. We are talking of sellers, and not users.—A. It is a stapling machine, envelopes, scale, milk sugar, which is a mixing paraphernalia or used—commonly used in the adulteration of heroin, is indicative, in my experience, of a seller of narcotics.

Mr. GELB. I move to strike it out. The answer is a conclusion that is not justified by the facts.

The COURT. All right.

Mr. GELB. It is indicative to him that the man is a seller. He might just as well find the answer——

Mr. LAPPANO. He has testified that from his experience those are the things that are commonly found with sellers of narcotics, as I understand the testimony.

By Mr. LAPPANO:

Q. Am I wrong or right about that?—A. That's right.

Mr. GELB. That is what he says. But I say he has no basis on which to say it.

The COURT. Objection overruled.

Q. Now, specifically, I will ask you, Officer: referring to People's No. 1 in evidence, which are 54 glassine envelopes: are these envelopes, in your experience, commonly used and adapted for use in connection with the sale of [58] a drug, a narcotic drug?

Mr. GELB. I object to it.

Let me state the grounds of my objection.

The COURT. Just read that again.

Mr. GELB. Are these envelopes, he says, "commonly used in the sale of narcotic drugs?" I daresay——

Mr. LAPPANO. Envelopes of this type.

Mr. GELB. Yes, envelopes of this type.

Now, I daresay envelopes of this type may be used for a hundred different purposes. Now, the question addressed, simply: are these envelopes, or of this type, used in the sale of narcotics, seems to be wholly not material. It doesn't say enough.

The COURT. Well, that may be an argument for the jury, but I will overrule the objection.

Mr. GELB. I say it is a conclusion on the part of this witness, based on no facts.

The COURT. Just like a burglar's tool: You may have a hammer or a chisel, which may have legitimate uses, and still under certain circumstances may constitute burglar's tools.

Mr. GELB. That's right. They are commonly used as such. When he asked him about all the paraphernalia, has he made arrests, in which he has found, let's say, envelopes plus the other things, then perhaps he might say "Well, I have in my experience found sellers to use them." Now, he is going to ask about each item. It seems to me, that's wrong.

[59] The COURT. The items that are now in evidence: are those articles commonly used by sellers of narcotics in the course of their business?

The WITNESS. In my experience, yes.

Q. Now, with respect to those cases that involved users of narcotic drugs: again talking now out of the experience you have had in those cases where arrests were made by you, and where you have testified, and convictions were had: you say

that there is a general pattern of what users generally possess, other than the narcotic drug itself?—A. Yes.

Q. Will you tell his Honor and the Court what that generally consists of?

Mr. GELB. I object to that.

The COURT. Objection overruled.

Mr. GELB. Before that, I would like to examine him as to his qualifications.

The COURT. All right, go ahead.

By Mr. GELB: (voir dire).

Q. You say there is a general pattern as to users? Users of what?—A. Users of narcotics.

Q. What kind of narcotics?—A. Heroin.

Q. What else?—A. Morphine. Cocaine.

Q. Yes?—A. That's the common drugs that are in use by users of narcotics.

Q. Heroin, cocaine and morphine?—A. Yes, sir.

[60] Q. You are not thinking of opium or marijuana?—A. No, sir. Opium requires different instruments, too.

Q. You have made arrests where persons have been in possession of heroin?—A. Yes, sir.

Q. Where they used it?—A. Yes, sir.

Q. And how did they use it?—A. The common way to use it is by injection, subcutaneous injections.

Q. But there is a——

The COURT. You mean with a hypodermic needle?

The WITNESS. Yes, your Honor.

Q. There is another way of using it? Right?—A. Yes, there is another way of using it.

Q. What is the other way?—A. By sniffing.

Q. That is heroin?—A. Yes.

Q. What about cocaine?—A. Cocaine, mostly by sniffing.

Q. And what about morphine?—A. Morphine, mostly by injection, subcutaneous injection.

Q. Now, in every case where you have arrested a user, who possessed heroin, cocaine or morphine, in every such case you say there is a pattern?—A. Yes.

Q. And the pattern that you say exists is because you didn't find certain items in their possession, is that right?—A. What do you mean?

Q. In other words, you reached that conclusion because [61] you did not find envelopes in their possession?—A. Oh, no; there is observation and other elements that enter into it.

The COURT. A little louder.

A. There is observation and other elements that enter into it. What I tried to say before, or what I am trying to say is that where they say an addict, that is addicted to heroin: invariably, and I say invariably, you will find what we call "the works". In the parlance of the underworld, what they themselves call "the works".

The COURT. What is it?

The WITNESS. That would be what they call a piece of cotton, which they call a "satch cotton", which is a saturated piece of cotton; it would be a spoon, usually bent and blackened, where they heat the narcotic with matches——

Q. That is for a needle? That's all for injection?—A. I am coming—one at a time.

Q. Go ahead.—A. And they call them "the works". And they are secreted on all parts of the body.

The COURT. Tell us what you mean by "the works".

The WITNESS. I would say a spoon, an ordinary spoon that is blackened; blackened for the fact that they light matches to heat it up. And, invariably, imbedded in that spoon is a small piece of cotton. I questioned users, and their explanation is when they take the narcotic through the hypodermic needle, which is also part of "the works", [62] the hypodermic needle, a syringe, a bulb, or sometimes a pin is used, or sometimes a short glass tube, with a rubber on top that can suck up this liquid—their explanation for the cotton is that when they suck it up, it takes some impurities. That is their explanation of it. So that a person that would use a safety pin, which happens at some time, would take the safety pin, and he would make a hole in the arm, and, in their parlance, it is a "mainliner": a person that shoots directly into their veins. A skin-shot is a surface shot in any part of the surface. You take the safety pin or hypodermic needle, and they put a handkerchief on their arm, and they pull up that vein, and they hold it with their mouth. Then they would take the needle, or the safety pin, or whatever implements they are using, and they

would insert it into that vein, and release on the handkerchief, and allow the narcotics to enter into their arm, on a skin-shot.

Q. That is for the man who injects it. How about the sniffer?—A. For the sniffer, invariably, in fact, you find a match box. It is usually ripped off here, [illustrating], and it is in a rounded form, where they take it, and they would round it, similar to this [indicating.] They would round the match; where they can take the narcotic, and put it on their hand, and they would shove this up their nose, and they sniff it in deeper.

[63] And another common instrument would be a dollar bill. A lot of times when you search them you take a dollar bill, you find that a dollar bill is all rounded in this form (illustrating), or this cardboard in this form. That is to enable them to sniff it back further.

Q. If a man wanted to sniff heroin, it would be comparatively simple for him, before he sniffed it, to arrange for his doing so?—A. Well, sure.

Q. Very easily?—A. Yes.

Q. So, in other words, if you were arresting a man who sniffed heroin, for possessing narcotics, you wouldn't look for anything, would you?—A. Just another point on that. As far as heroin being sniffed is concerned, I have found by talking to many of the prisoners—quite a few prisoners—that after a period of time sniffing heroin, that the membranes in the nose become affected and become very sore; and a person that sniffs heroin, after a period of maybe—according to the general condition of the person, but a period of three to six weeks, they abandon the sniffing of heroin——

Q. In other words———A. And they go to this subcutaneous injection.

Q. That is based upon what certain people told you?—A. That is based upon experience with quite a number of people I questioned.

[64] Q. Some people told you if you sniffed more than three to six weeks———A. Heroin.

Q. Heroin, your membranes are affected?—A. Yes.

Q. And that they go to the needle?—A. Yes.

Q. You don't know whether that is so?—A. Of my own experience?

Q. Yes. I mean you don't know whether there aren't people who sniff for a much longer time?—A. I have never heard of it.

Q. You don't know of any?—A. No.

Q. So your pattern you speak of is that—when a man is selling narcotics, he usually puts them in envelopes, to sell them? Is that right?—A. That's right, yes; cellophane envelopes, or cellulose or cellophane envelopes.

Q. Why cellophane envelopes?—A. I don't know the particular reason, but——

Q. Why a stapling machine? Do you know?—A. Well, in order to hold the drug in there.

Q. You could do it with a pin, couldn't you?—A. No. They use these double packages——

Q. You can do it with two pins. And you can turn over the top?—A. But it isn't convenient.

Q. You mean if you turn over the top of the cellophane envelope [illustrating]—here. You turn it over several times. [Illustrating.] You can't———A. In the first [65] place——

Q. Keep the contents?—A. An ounce may not fit in there. In the second place, the pin invariably rips it, in my experience; but I don't know——

Q. My point is, why cellophane envelopes?—A. All I can tell you, counsellor, is from experience. And in my experience, on all the packages I have ever brought into the Squad, and that is quite a lot of stuff, I have brought in——

Q. You have usually seen it in cellophane?—A. It is invariably in cellophane.

Q. Let me ask you this: you have arrested sellers of narcotics who didn't have staplers and did not have a scale?—A. That is according to the conditions——

Q. But you have made arrests of sellers who didn't have them?—A. Definitely. Out on the street.

Q. So there is no pattern?—A. There is a pattern when there is a plant or a place of location. Invariably——

Q. What you are really saying—isn't this true: that what you are really saying is that when you find narcotics and you find a stapling machine, and you find envelopes, you assume that that person who possesses those things is a seller because you have had other sellers who have had those things?

Mr. LAPPANO. Your Honor, may I at this time respect-
[66] fully object?

The COURT. Objection overruled.

Q. Isn't that true?—A. That is what you're saying.

Q. I am asking.—A. What I am saying is this: that in the experience of over 200 cases, and in the experience of talking to men that have been much longer in the Squad than I have, from the experience of talking to addicts practically every day in the week that I work, and from the experience that I have actually had on investigations in cases, it is the invariable practice, as far as I can see, when there is what we call a "plant" in the underworld parlance, or a plan of concealment, or location, a place where stuff is packaged, where it is weighed, where they get it ready for delivery: when we get to that particular point, invariably we find a scale, we find envelopes, we find milk sugar, and we find a stapling machine.

Q. Now, a user doesn't use heroin pure. It is mixed with milk sugar?—A. A user will use it any way they get it.

Q. Usually it is mixed with milk sugar?—A. A user himself would not mix it with milk sugar.

Q. Whoever mixes it.—A. The seller would mix it and sell it to the user that way.

Q. A user could buy heroin and could buy milk sugar, and mix it?—A. But users invariably do not do that. They
[67] don't mix it themselves.

Q. Because you say you haven't found a user who has done it?—A. I have talked to plenty of users. They use it just the way they get it.

Q. You haven't found a user who doesn't? Isn't that true?—A. I haven't. No.

Q. Isn't it true that, generally speaking, heroin is mixed with milk sugar for use for dope addicts?—A. It is just used to make a profit. A drug user just wants to use the pure heroin in the purest form that he could possibly get. And if he is mixing it for himself, he is only kidding himself.

Q. It depends upon strength?—A. They don't go by strength. I have never heard of an addict talk about strength.

Q. Heroin is usually sold—what percentage heroin and what percentage milk sugar?—A. It is all according to the trend of the times.

Q. From your experience?—A. Right at this particular time?

Q. Within the last few months?—A. Let me say this: that heroin itself—what we call "pure heroin",—there is no such thing as pure heroin——

Q. I heard Mr. Lappano say something about 30%.—A. 80% would be a very good percentage of heroin. It would be actually what we in the Department would call "pure".

Q. From your experience?—A. Approximtaely 80%.

Q. That is pure? What is usually sold to the addict?—[68] A. I have brought—I have made arrests, and in certain areas where the contents of the capsule was 1/10 of 1% as far as purity or strength is concerned.

Q. Can you say that there is a usual—there is a practice of usually selling a certain percentage to an addict, of heroin, in the combination, or whatever———A. It is all according to the group that you would have—happen to be working on. It would be all according to the——

Q. In other words———A. The particular plane that you would hit. In other words, if it is the fellow that takes it right off the ship, then you would get maybe 60%, because it was only cut once.

Q. I am talking about the user, generally. There is a market for the sale of heroin to users?—A. That's right.

Q. Right?—A. Yes.

Q. Can you say whether there is a practice with respect to the percentage of heroin, in the combination of heroin and milk sugar, sold to users, generally? Take—don't take the upper class———A. I say it is in a particular locale. If there is a certain area, I would say that the percentage was very pure where it is being sold in capsule form. There is another section of town that I work in where they use small—what they call "thirty-second packages". They call it—it is a little better percentage. That would be, say, right at this particular time, say, 145 a little——

[69] Q. What percentage?—A. Well, I would say, roughly, about this time, about 8%. That is, if you buy a $5 package. I say, if you buy a cap down around 112th Street and 5th Avenue, I have got them 1/10th of 1%.

Q. In other words, 8% is high, or do you find them stronger—sold stronger, for users?—A. Right at this particular time I know from myself from buys, that the quality of the narcotics in New York is very weak.

Q. All right. Now let me put the question to you once more. When you find heroin in the possession of somebody, and you find envelopes and a stapler, and a scale, you assume——

The COURT. And the milk sugar.

Q. You assume the man sells this stuff, isn't that so?—A. I am not allowed to assume anything, as a police officer.

Q. Well, you are assuming.—A. No, I am not assuming.

Q. When you say——

The COURT. Whether you use the word "assume" or not, when you see all this combination of things that are now in evidence, from your experience you found that that combination spelled seller?

The WITNESS. Yes, that combination was a definite indication toward a seller.

Q. Let me ask you this: you found a scale?—A. Yes, sir.

[70] Q. You say the first time you saw that scale?—A. That particular type; yes, sir. But I may say this: a couple of days afterwards I saw the same kind of scales.

Q. Used by sellers?—A. Yes.

Q. Did you ever see this scale as a souvenir in connection with a set of books, a desk set? Did you ever see this scale as a souvenir?—A. I never did. Not as a desk set. No, sir.

Q. This is the first time you saw such a scale, in your years of working on the Narcotic Squad, in your four years? You say this was the first time you saw such a scale, December 21st?—A. Let me clarify myself. I had seen—I mean I have seen such a scale, but this is the first time that I have ever seen a scale in the seizure with narcotics.

Q. Where did you see such a scale?—A. I saw them in the Navy. They are letter scales.

Q. For envelopes?—A. Yes.

Q. To see how much postage is required?—A. Yes.

Q. Then this is not a typical scale used by sellers?—A. I asked him about it, and he showed me——

Q. I understand that. But I say this is not a typical scale. Of course, you say he admitted he was———A. He showed me how it worked.

Q. Of course, he told you a lot of things. He said to you he was in the racket, right from the beginning? He had [71] been in the racket?—A. Yes.

Q. Well, at any rate, this scale is not a typical scale used by those who sell narcotics?—A. No.

Q. And you saw one more, you say?—A. Since then, yes.

Q. Since then?—A. Yes.

Q. And you made an arrest?—A. Yes, sir.

Q. The case pending?—A. Either he was sentenced yesterday, or it is pending.

Q. He pleaded guilty?—A. Yes, sir.

Q. Now, the fact that you find this type of scale in his house, did that set you thinking whether or not this fits into the pattern?

Mr. LAPPANO. Mr. Gelb, may I please object?

The COURT. Objection sustained.

Q. What? It didn't make any difference to you that it was this kind of scale?

Mr. LAPPANO. I object to this line——

Q. You add this, together with the other things, and you assumed that the individual who possessed them is a seller?

Mr. LAPPANO. May I respectfully object, again?

The COURT. Objection overruled.

Q. Is that right?

The COURT. You say the combination of things is what?

The WITNESS. The most impressive thing, in my opinion—if that is what the attorney means—is the milk sugar [72] and not the scale.

A. All right. Let me ask you another question. You testified with respect to admissions made by this defendant. In the absence of admissions—supposing he kept silent——

Mr. LAPPANO. Now, your Honor, may I object?

Mr. GELB. Wait a minute.

Q. Whether it is this defendant or anybody else——

The COURT. Let him finish the question.

Q. In the absence of any admissions made to you, if you found this stuff, these exhibits, together with the heroin, you would assume the man was intending to sell it?

Mr. LAPPANO. May I at this time object, if your Honor please?

Q. Is that right?

Mr. LAPPANO. This witness—I didn't give him up to Mr. Gelb for all general purposes, but for a limited purpose. Now we are going far afield here.

The COURT. Objection overruled.

If there had been no admissions, if you found all these things in the possession of one person, the milk sugar, the scale, the envelopes, and the stapling machine, from your experience would you say that that meant the person having the narcotics was a seller?

The WITNESS. Yes, sir.

Mr. GELB. That's all.

[73] Direct examination continued by Mr. LAPPANO.

Q. Now, you have testified that in the case of users, they resort to the use of hypodermic needles, and eyedroppers, or a tube with a rubber bulb at the end, and so forth?—A. Glass vials.

Q. Did you find any such thing as that in the apartment of Angelet at the time that you made this arrest?—A. No, sir.

Q. Now, Mr. Gelb has asked you about the contents of heroin in a mixture. I think he tried to find out whether there was a certain norm, or an average content, in a capsule. These capsules—by the way, what is their usual capacity, of the capsule that you find on other persons that use this stuff?—A. About 1 grain to a grain and a half.

Q. Is there such a thing as an average quantity of heroin in a capsule? Is there such a thing as an average?—A. Not a practical average. They would vary from capsule to capsule. There is a basis that has been set, though.

Q. What is that?—A. 3%.

Q. 3%—A. Yes, sir.

Q. So where you have a narcotic—heroin, specifically—say 30%, that could be cut into ten units of 3%, isn't that so?—A. Yes, sir, it could.

Q. Do you know how many grains there are in an ounce?—A. There is 437.5. Four hundred and thirty-seven and a half [74] grains.

Q. So that four hundred and thirty-seven grains, or an ounce of 30% narcotics—if I am wrong you correct me—you could make a capsule—that is 437 capsules—of 30% strength. Is that right?—A. That's approximately. Roughly, that's about right.

Q. Or if you wanted to dilute that, if you want to make it 15%, you would have twice as many capsules, is that right? 437 times 2?—A. That is correct.

Q. Is that right?—A. Right.

Q. That would be 934?—A. Right.

Q. Of that same additional ounce of 30% potency?—A. That is correct.

Mr. GELB. Twice 437?

Mr. LAPPANO. Yes.

Mr. GELB. 874.

Mr. LAPPANO. 874. Right.

Q. Is that right?—A. 874. That's right.

Q. Of the 15% potency? Is that right?—A. That's right.

Q. Now, if you wanted to cut that down——

Mr. GELB. That is not evidence, if your Honor please. I object to it.

The COURT. All right. Now——

Mr. LAPPANO. This jury doesn't, probably, have the [75] experience——

The COURT. All right.

Mr. GELB. You can cut it down to——

Mr. LAPPANO. We'll get the chemist to go through that, then.

The COURT. All right. I am sure that the jury understands that you can cut any chemical by diluting it, and creating more portions.

Mr. GELB. You can do it with soup.

The COURT. That is, you can cut it by adding water, and you can cut narcotics by adding the milk sugar.

Q. By the way, from your experience, do you know what a capsule of heroin, say, of 3 or 5% contents, sells for?

Mr. GELB. Wait a minute. I object to that. What a capsule sells for?

Mr. LAPPANO. That is 1 grain of 1½ grains.

Mr. GELB. What do you mean?

Mr. LAPPANO. A capsule of heroin?

Mr. GELB. What kind of heroin?

Mr. LAPPANO. Say 5% or 3% heroin.

Mr. GELB. Well, there is no such thing as what it sells for. I object to it.

Where? From a seaman? From a man——

Mr. LAPPANO. No. From a person who is a user.

Mr. GELB. I mean——

Mr. LAPPANO. What he pays for it.

[76] Mr. GELB. It depends upon where he buys it.

Q. Can you tell us? Up in Harlem, say.

The COURT. Give us the lowest price——

Mr. LAPPANO. Yes.

The COURT. That any person could buy that for.

The WITNESS. Around $1 now, the lowest price. A dollar a capsule.

Q. And that is about 3%? or 5%?—A. Much less than 3%.

Q. Even less than 3%. But it is about a dollar a capsule, less than 3% content?—A. Yes, sir.

Mr. LAPPANO. All right, Mr. Gelb.

Cross examination by Mr. GELB.

Q. By the way, did you find the gun?—A. No, sir.

Q. Where did you look?—A. All over the place.

Q. When you talk about being in the bedroom, I didn't hear you say anything about searching any other room than the bedroom.—A. Detective Schein was in and out.

Q. How many rooms were there there?—A. Kitchen, bathroom, living room, bedroom, bedroom on the right, baby's room—there was a small baby's room.

Q. How many rooms did you search?—A. Oh, all of them. All of them. I mean—I, personally, myself?

Q. Yes. Yes.—A. I searched part of the both bedrooms.

[77] Q. You searched by yourself, didn't you?—A. No. Detective Schein searched, and——

Q. You had the defendant——

Mr. LAPPANO. Will you let him finish, please? I think he was going to add somebody else.

A (continuing). And Agent Fitzgerald.

Q. Yes. Later. But did you have the defendant sit in the living room while you were searching?—A. As we moved to any room, we would bring him with us.

Q. You were searching in his presence?—A. Sure. That's right. Yes, sir.

Q. Every part of the house?—A. I don't think we missed any part, except the baby's room. I think that the baby was sick and asleep.

Q. By the way, what kind of a house is this? An old tenement?—A. That's right.

Q. And did you find out how much rent?

Mr. LAPPANO. That is objected to as immaterial.

Mr. GELB. He asked him, and he said, in one of his questions "How could you"——

The COURT. Objection overruled.

Did you find out, or many any inquiry? If you did, say so. If you didn't, say so.

The WITNESS. I asked him. I think he said $37 or $47 a month.

Q. Because you said "How could you afford to live here?"—[78] A. That's right.

Q. And you found out. And did you know then the rent was $37?—A. Did I know when I asked him? No, I didn't.

Q. You found out, however?—A. Yes.

Q. It is an old tenement house, isn't it?—A. Well, I mean I don't know how old it is——

Q. It was a cheap type of an apartment, isn't it?—A. No, I wouldn't say it was cheap. It was pretty nice, in my opinion.

Q. I am judging only from the $37.

Mr. LAPPANO. I object to that.

The COURT. We will assume that a four room or five room apartment at $37, or even 3½ rooms has no doorman, has no elevator man——

Mr. GELB. That is putting it mildly.

The COURT. And is a very cheap apartment, even at frozen rents.

Q. All right. Now, you searched the apartment. What furniture was there in his bedroom?—A. There was a bed. There was a——

Q. A closet?—A. Yes, there was a closet.

Q. And a bureau, or dresser? Which?—A. One of each. A bureau and a dresser.

Q. Now, there were things lying on the floor?—A. No. It was all piled up in baskets.

Q. Well, they were on the floor?—A. Yes, sir.

[79] Q. And there were things on the bureau and on the dresser?—A. Well, the usual——

Q. What?—A. The usual things that were in an apartment.

Q. They weren't these things like the stapler? [Showing stapler.] Stapler, the envelopes? Weren't they on the bureau or dresser?—A. No, they were in the drawer.

Q. What drawer?—A. The top drawer of the dresser.

Q. Open? Just opened the drawer?—A. I opened it.

Q. And they were right there, is that right?—A They were laying in there with other stuff.

Q. They were lying right there?—A. They were laying there, mixed with other stuff.

Q. Right in the top drawer. You had no difficulty finding them?—A. No, sir.

Q. Did you open every one of the drawers?—A. Yes, sir.

Q. Where was this mug?—A. Gee, I don't know where that was.

Q. You don't know where it came from?—A. When I first saw it, Fitzgerald said to me "Here, look at this. How about this?"

Q. Did you ask him where he found it?—A. I just took it and asked George about it.

Q. You don't know where he got it?—A. In the vicinity.

Q. Were you in the room when Fitzgerald was looking around?—A. Yes, sir.

[80] Q. Had you looked in the closet?—A. In the closet? I looked in the closet, yes.

Q. Did you look on top?—A. No, sir.

Q. Did you see anything on top of the closet?—A. I saw hat boxes.

Q. You didn't look in the hat boxes?—A. I started another way. I started searching another way.

Q. Did you watch Fitzgerald as he was looking?—A. I saw him when he came in, and I heard him say, "Did you look here?"

Q. And was the stuff that you say the defendant called cocaine and heroin in the hat box?—A. When I saw him he had the hat raised up, the stuff was laying underneath. It was a cellophane hat box, if I can remember correctly.

Q. Cellophane hat box?—A. Yes, sir.

Q. Was the stuff in or out?—A. It was in.

Q. So there is no question but that there was heroin and cocaine found in that bedroom? Right?—A. Sure. Yes, sir.

Q. And you assume that the defendant knew he had it there?

Mr. LAPPANO. I object to that, if your Honor please.

Mr. GELB. I am going to cross-examine him about his questioning, his state of mind. And I must ask him questions——

[81] Mr. LAPPANO. I know, but may I respectfully object to the form of that question?

The COURT. Objection overruled.

Q. You took it for granted that the defendant knew he had narcotics in the house?—A. I just went by what he told me.

Q. What he told you after you found it?—A. After I found it. He said it was his.

Q. Otherwise you weren't sure at that moment whether it was his?—A. I didn't know. You mean when it was found?

Q. Yes.—A. I assumed it was his, being it was in his bedroom, and just to make sure I asked him and he verified it.

Q. I say you assumed it was his. And you assumed he knew it was his—A. I don't know what he thought. All I know, it was in his room.

Q. I want to know what went through your mind.—A. What went through my mind?

Q. Yes. You took it for granted it was his, and he knew he had it there? A. As soon as I found it, as soon as I saw it was narcotics, and I saw he was in the room, I knew it was his.

Q. Now, when you first started to look, and you opened the drawer and you found the envelopes, you say you questioned [82] him about the envelopes?—A. Yes, sir.

Q. Now, did you find the envelopes first, or did you find them all together—A. I picked the envelopes out first. I saw the envelopes first. They attracted my attention first.

Q. You found the envelopes, and you asked the defendant, you said, about these envelopes. Right? And the first thing he answered was "Well, when I used to be in the racket I used them. I got no further use for them."—A. Yes, sir.

Q. In other words, he admitted to you then that he had sold narcotics? Right?—A. He admitted to me then?

Q. Yes.—A. He did not admit to me then.

Q. He said "When I used to be in the racket, I used them; but now I have no further use for them?"—A. He knew who he was talking to. He knew me.

Q. I know. But you understood by the words "When I used to be in the racket", selling narcotics? A. Yes.

Q. So he admitted to you, according to your testimony, when you confronted him with these envelopes—he admitted to you that he had been in the racket of selling narcotics? A. I mean—I don't get the point you are getting at, counsellor.

Q. What admission did he make to you when you showed him these envelopes and questioned him? A. He said, "Yes, [83] sure, I had them when I was in the racket before, but I am out of it now."

Q. What racket was he talking about?—A. About the narcotics racket. He knew me from the Narcotics Squad. He knew me. He meant that. He knew me previously.

Q. He knew you previous?—A. Sure, he did.

Q. You never arrested him?—A. No, but I questioned him.

Q. You never arrested him?—A. No, I never——

Q. He was never charged with selling narcotics?—A. Previous to that?

Q. Yes.—A. I don't know about that.

Q. Didn't you look at his criminal sheet?—A. He might have been picked up for investigation or something—I don't know.

Q. He was never picked up and charged with selling narcotics. Don't you know that?—A. No, I don't know it. I mean——

Q. Do you want to take a look at his criminal sheet?

Mr. LAPPANO. May I respectfully object to that, if your Honor please?

The COURT. Objection sustained.

Q. Well, you know he was never convicted of selling narcotics?—A. Never convicted, no.

Q. Yes. You say that he had been arrested for selling [84] narcotics?—A. I didn't say that, no. I said I questioned him about narcotics.

Q. I understand that. But I ask you now: had he ever been arrested for selling narcotics?

Mr. LAPPANO. I object to it as improper at this time, your Honor.

The COURT. Do you know if he has ever been arrested for it?

The WITNESS. No, I don't.

Mr. LAPPANO. I object to that as improper at this time.

The COURT. All right.

Mr. GELB. "At this time?" I don't get it.

The COURT. Objection overruled.

You say you did on some previous occasion question him about it?

The WITNESS. Yes.

Q. How long prior?—A. About three years before.

Q. Three years before. Where?—A. Up in Carmen's Restaurant, up in 5th Avenue and about one hundred—it is about 111th Street—between 110th and 111th Streets.

Q. You told him you were a detective on the Narcotic Squad?—A. When I came in?

Q. Three years before.—A. Did I tell him? At that particular time?

[85] Q. And you had no reason to arrest him?—A. At that particular time?

Q. Yes.—A. No. Not to make an actual arrest, no.

Q. Well, if you had any evidence———A. I would have arrested him.

Q. You would have arrested him?—A. That's right.

Q. So he knew you. He knew you from the Narcotic Squad?—A. I assumed he did, yes.

Q. And you say when you showed him these envelopes, he admitted he had been a seller of narcotics?—A. Yes.

Q. Right off?—A. Yes.

Q. You didn't have to urge him? Argue with him? Did you?—A. No.

Q. The first thing he did was admit it?—A. Sure.

Q. Did you question him about the persons to whom he had sold, at that time?—By the way, did you ask him: "Who did you sell narcotics to?"—A. Did I ask him?

Q. Yes.—A. No. I told him who I thought he was selling them to.

Q. You told him then?—A. I told him at one time——

Q. Is that part of the conversation?

Mr. LAPPANO. May he be permitted to finish his answer?

Mr. GELB. I don't want to leave the impression that I——

[86] Mr. LAPPANO. I don't think you do it intentionally but he isn't finished.

Mr. GELB. All right, go ahead.

The COURT. Finish your answer.

A. At one time in the conversations, some particular phase of it, when I was talking to him, I told him that I knew who he was selling narcotics to, or I knew the vicinity he was selling, and I told him all about what I knew about his activities in the narcotics——

Q. But you told him during the course of the conversation?—A. At one time, during the talks, which was for a long drawn-out period of time, possibly in the car, on the way to the Precinct, or in the cell in the precinct, the next day in Court I talked to him—I questioned him again, when he was being arraigned; at another later date, when I was brought up to the Supreme Court, I talked to him again down there when I thought he wasn't going to cooperate. Any more I told him then exactly of what I knew about his operations in the narcotic field——

Mr. GELB. Incidentally, that reminds me: If your Honor please, I move to strike out the conversation with respect to cooperation. It has absolutely no bearing on this case. If

the defendant possessed narcotics, and failed to reveal the source——

The COURT. I will strike out that portion where they [87] asked him to cooperate and to give him the sources, and that the defendant said he would think it over and let him know.

Mr. GELB. May I ask your Honor to instruct the jury to disregard it?

The COURT. All right. Disregard that portion of the testimony when you come to decide whether or not the defendant possessed narcotics with intent to sell them.

Mr. LAPPANO. Your Honor, may I be heard for just a moment on that?

The COURT. You can have an extended argument in the absence of the jury.

Mr. LAPPANO. May we come up to the bench for just a moment?

The COURT. Yes.

(Thereupon both counsel conferred with the Court at the bench, off the record.)

Mr. LAPPANO. All right, Judge, I will withdraw my objection.

Q. After he told you he had been in the racket of selling narcotics, that is when you showed him the envelopes, you testified that then you showed him the empty capsules, and ypu questioned him about that?—A. Yes.

Q. And then you said you showed him the stapler and you [88] questioned him about that?—A. Yes, sir.

Q. Then you said you showed him the scale and questioned him about that?—A. Yes, sir.

Q. I don't quite understand this. You mean when he told you he had been in the racket, selling narcotics, each time you showed him an item he repeated that he had used it when he was in the racket?—A. That is not my idea of the way of things. That is the way we are trained to operate. We are taught to repeat and repeat and repeat on each——

Q. You repeated each time?—A. Yes, sir.

Q. And each time he said the same things: "I used them when I was in the racket of selling narcotics"?—A. Or words to that effect. "Well, that's the same thing." "The same thing". Words to that effect; yes, sir.

Q. And he admitted freely?—A. I don't know whether it was freely or not, but that is exactly what he said.

Q. Did you know anything about his criminal record at that time, and his past?—A. Did I know about his past?

Q. His criminal record. [89]—A. I don't know about his criminal record.

Q. Did you know anything about a criminal record?—A. About his activities, yes; but his criminal record——

Q. No, no. You are a policeman who has testified many times——

The COURT. You didn't know anything about his specific criminal record?

The WITNESS. No, not his specific criminal record.

Q. You used the words "activities". You are a policeman for several years. You have testified quite a number of times on the stand?—A. Yes, sir.

Q. And you know that isn't proper?—A. No. You're just taking me up wrong. I don't want to say outright about his criminal record. But what I want to say is that I had known about him—or I knew him from a picture that I had seen in the files, and if I had known he had been convicted of a crime, yes.

Q. You weren't trying to imply you knew him as a narcotic seller?—A. No, I wasn't trying to imply anything.

Q. You did not intend, then, to imply that?—A. I intended to answer the questions to the best of my knowledge, that's all.

Q. I say you did not intend to imply that?—A. I did not intend to, no. I did not, no.

Q. Now, he freely admitted possessing the heroin and the cocaine, whatever percentage it was in that, didn't he?— [90] A. He said it was his.

Q. Freely admitted. I mean you didn't have to urge him to admit it?—A. No.. He just said it was his.

Q. Whereas, while you were questioning him about these items, he said he was out of the racket?—A. Yes, sir.

Q. And had been out of it? The moment you found the heroin and cocaine, you say he admitted that he was in the

racket of selling?—A. The moment I found it, he said "All right, you got it. That's it."

Q. You didn't have it?—A. What?

Q. But all you had was a possession of narcotics. Right?—A. That's all I had. Yes, sir.

Q. And the moment you found the narcotics, he not only admitted it was his, but he said to you "That's my racket, selling narcotic drugs."—A. When I questioned him about the difference between them, how he could distinguish the difference between them——

Q. I say, you had no difficulty drawing that from him?—A. No.

Q. When he told you he was out of the racket, did he tell you that with some firmness? Did he insist that he was out of it, that he wasn't selling narcotics?—A. Oh, sure. Sure. He told me as if he meant it.

Q. By the way, did you assume that he knew that possessing narcotics was one crime?—A. Did I assume that he knew possessing narcotics was one crime?

[91] Mr. LAPPANO. I object to that as immaterial.

The COURT. Objection sustained.

Q. When you found the heroin and cocaine—by the way, cocaine: what percentage of cocaine was there?—A. What is the percentage of the cocaine? [Looking at paper] It don't give the percentage here. It just gives the amount.

Q. Wouldn't the chemist have the percentage?—A. I don't know.

Mr. LAPPANO. It is a different thing altogether.

Mr. GELB. What do you mean "It is different"?

Mr. LAPPANO. The heroin is——

Mr. GELB. What percentage is the cocaine? Is it cocaine?

Mr. LAPPANO. 18 capsules.

Mr. GELB. Is it cocaine?

Mr. LAPPANO. 18 capsules of cocaine.

Mr. GELB. They have got to analyze it. Did the chemist analyze it?

The COURT. Have you got the chemical analysis?

The WITNESS. Yes, here it is [showing paper].

Q. What does it show there?—A. He calls it "Item No. 4".

Q. What does it say?

(The paper is handed to the court)

The COURT. On this chemist's report, signed by Samuel Tabor, there appears "Item No. 4, 18 capsules containing cocaine, 44 grains."

[92] Mr. LAPPANO. That's right.

Q. By the way, does cocaine have certain percentages?—A. Sure.

Q. Well, do you know whether this is one-tenth of one per-cent cocaine in that compound, or 2%, or what?

Mr. LAPPANO. Mr. Gelb, may I suggest——

Mr. GELB. Yes.

Mr. LAPPANO. The chemist is here and will be called.

Mr. GELB. I thought maybe he knew.

Mr. LAPPANO. I think you better use the chemist on that.

The COURT. Do you know about it or would you rather have the chemist testify?

The WITNESS. No sir. The chemist would know. I don't know.

Q. So I say, when you found that and asked the defendant about it, he said "Well, I am in the racket. That is my racket." Is that it?—A. Yes sir.

Q. "Selling narcotics. I have been in it a couple of years." Right?—A. Yes.

Q. By the way, do you know he was laid up in the hospital for a long time?—A. Yes sir, I know it.

Q. When did you find that out?—A. I knew it at the time. I knew he had an accident, an automobile accident.

Q. Yes.—A. I know about that.

Q. Did you know how long he was laid up in his home?—[93] A. He was laid up quite a time.

Q. Eight months?—A. I wouldn't know the exact time, but I know——

Q. During the year 1949?—A. About that time, I know it was for a very serious accident.

Q. And he said to you "I have been in the racket a couple of years", in December 1950?—A. Yes sir.

Q. That is what he said to you?—A. Yes sir.

Q. During 1949 did you observe this defendant? Did you go after him?—A. Did I ever have him under observation?

Q. '49. During the year 1949.—A. During the year 1949 did I ever work on him? Is that what you mean?

Q. Did you watch him? Did you observe him?—A. Yes.

Q. Do you remember hom many months he was in his house?—A. I didn't observe him in his house. I had observed him before that.

Q. I am talking about 1949.—A. Right before he went into the hospital.

Q. He went in December 1948. I am talking about '49.—A. '49? Well, no,—Oh yes. After he come out of the hospital a while, yes.

Q. When did he come out?—A. I don't know when he came out, but I know it was near—one particular time during '49 that I had him under observation. And I knew he was out of the hospital because I saw him with the braces on. Braces on,—[94] what I knew he was.

Q. By the way, he has members of his family. Brothers, rather?—A. Yes, sir.

Q. And you know some of his brothers?—A. Yes sir.

Q. And you have observed his brothers from time to time?—A. Yes sir.

Q. Right?—A. Yes sir.

Q. Trying to make a case against them?—A. Yes sir.

Q. You assumed in your own mind that his brothers deal in narcotics?—A. Do I assume in my own mind? All I know is that his brother was arrested at one time for the sale of narcotics.

Q. I am allowing you a license. I am asking you as a policeman. You knew, in your own mind, assumed that his brothers are engaged in the narcotic business?—A. I have received confidential information that they are engaged in the narcotic business.

Q. So you are satisfied his brothers are?—A. That's right.

Q. That is, from your own state of mind?—A. No. That is from confidential——

Q. That is———A. Information.

Mr. LAPPANO. I object. Let him finish his answer.

The COURT. Let the witness answer.

Q. Go ahead.—A. From confidential information I have [95] received, and from a study of the files of the Federal Narcotics Bureau.

Q. You see, I tried to stop you because when———A. I am sorry.

Q. I will tell you why.

Mr. LAPPANO. You gave him a license.

Mr. GELB. No, I didn't give him a license.

The WITNESS. You said that.

Mr. GELB. I asked him about the state of mind.

Mr. LAPPANO. You said you gave him a license on how he got into that state of mind.

Mr. GELB. I did not. I did not ask that question.

Mr. LAPPANO. All right.

The COURT. Gentlemen, please,——.

Mr. LAPPANO. Then I am mistaken.

Mr. GELB. I know I am giving him a wider latitude than I normally would. But I say I did not ask him that,——

The WITNESS. All right.

Mr. GELB. Regardless.

Q. What I am driving at: You assumed his brothers were engaged in the narcotics business?—A. I don't assume.

Q. That is the assumption?

The COURT. From the information you had, did you believe he was?

The WITNESS. Yes, sir.

[96] The COURT. All right.

Q. You assumed this fellow had a gun, didn't you?—A. I didn't assume anything. I was told.

Q. You were told?—A. Yes, sir.

Q. But he didn't have a gun?—A. He didn't have a gun?—No. No, sir.

Q. So you were told wrong?—A. Yes sir. That's right.

Q. Right?—A. Right.

Q. So it is not infallible what you are told? You know that from your own experience, you could be misled. That is what I am driving at.—A. Definitely. Yes sir.

Q. All right. Now, again I ask you, what part of—when in 1949 did he begin walking around?—A. I don't know the

specific date. I am up and down, and through, and out there, all day and all night.

Q. Because you say———A. I happened to see him at one particular time in 1949 when he had braces on.

Q. You say in December 1950 he said to you "I have been in this racket a couple of years"?—A. Yes sir. Yes.

Q. Which, I take it, means 1949, and 1950?—A. That is what he said. Yes, I guess so. I don't know. I am just telling you what he told me.

Q. All these admissions he made freely to you?—A. Yes, sir.

Q. Right?—A. Yes, sir. Yes.

[97] Q. You didn't have any trouble getting them?—A. I don't know—in the beginning he didn't admit anything. It was just near the end——

Q. He admitted right at the beginning that he had been in the racket of selling narcotics? Right at the beginning when you showed him envelopes———A. You can't arrest a——

Mr. LAPPANO. I object to that, if your Honor please. That is not a complete statement of what he said.

Mr. GELB. Why isn't it complete?

Mr. LAPPANO. Because he said that he had gone out of it, and was not in it any more, at that time: he was out of it.

Mr. GELB. That is just what I say.

Mr. LAPPANO. Please limit it to that extent.

The COURT. Please ask the witness.

Q. What is the answer?

The COURT. What is the question?

The WITNESS. I forgot the question.

Mr. GELB. He says that he did not——

The COURT. The stenographer will read the question.

(The last question and portion of the answer were read as recorded.)

The COURT. Finish your answer.

Q. He admitted right in the beginning?—A. He admitted that he had been in the racket——

Q. Had been?—A. Right. That's right, but he was not [98] saying that he had been in the racket all along. Right at this particular point he was saying he was not in the racket.

Q. I say from the moment you started talking to him, he began making admissions to you freely?—A. That he had been in the racket.

Q. First he admitted to you that he had been in the racket?—A. Right.

Q. He was admitting to you, he was saying in effect to you "Mr. O'Brien, I was a peddler of dope". That is what, in effect, he was saying, although he had never been convicted of it, never been arrested for it?—A. That's right. Yes.

Q. That is what he said to you right off?

Mr. LAPPANO. Your Honor, I am going to object to this, about "Right off", right off. That is not so at all. That is not the testimony. It was not until after the envelopes were found, it was then that he said it——

Mr. GELB. That's "right off."

Mr. LAPPANO (continuing). That those were carry-overs from the racket he had been in. So it was not "Right off."

You make it appear that as soon as he started talking to him, he said "Oh yes, I have been in it." It was not until after he found the envelopes.

Mr. GELB. That is right off.

The COURT. The jury will pay no attention to the colloquy between counsel.

Mr. GELB. Is your Honor going to sit until about 4:15 [99] or so, or 4 o'clock?

I only want a minute, a couple of minutes recess.

The COURT. Surely.

(Mr. Gelb stepped out of the courtroom.)

The COURT. You want a short recess?

The JURORS. Yes, sir.

The COURT. Take a five minute recess. You are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusion as to the guilt or innocence of the defendant until the case had been finally submitted to you.

(Trial resumed after short recess.)

Q. You testified that you said to the defendant that you wanted the source of supply?—A. Yes sir.

Q. And you told him you were going to hold him for a felony?—A. Yes.

Q. Did you say to him that if he gave you the source of supply, you would not hold him for a felony?—A. No; I did not.

Q. Well, did you intend to convey that to him?—A. I did not.

Mr. LAPPANO. I object to that, if your Honor please.

The COURT. He said he did not intend to convey that to him. Objection overruled.

[100] Q. Well, you did say "I told him I am going to arrest you for a felony."—A. That's right.

Q. But you did not intend to convey anything more than that it is a serious crime, is that it?—A. I specifically intended to convey that it was a very serious crime, yes sir.

Q. And that he should give you the source of supply. Right?—A. Yes sir, if he would.

Q. And what did you promise him?—A. I promised him nothing.

Mr. GELB. All right. That's all.

Redirect examination by Mr. LAPPANO:

Q. As I understood you to testify—if I am wrong, you correct me—you told him if he wanted to cooperate you would bring him down to the District Attorney?—A. Yes sir.

Q. Is that what you said?—A. That is exactly what I said.

Q. You did not induce him, but from that point he would work with the District Attorney?—A. Yes sir.

Mr. LAPPANO. All right, that's all.

The COURT. Are both sides through with this witness?

Mr. LAPPANO. Yes.

Mr. GELB. Yes.

Mr. LAPPANO. Mr. Tabor.

Samuel Tabor, residing at 2724 University Avenue, the Bronx, New York, called as a witness on behalf of the People, being first duly sworn, testified as follows:

[101] Direct examination by Mr. LAPPANO:

Q. Mr. Tabor, you are the City Chemist?—A. Yes, I am.

Q. Employed by the Police Department of the City of New York?—A. Yes.

Q. How long have you been such? A. Fifteen years.

Q. And your duties are what?—A. To make chemical analysis of evidence brought in by police officers.

Q. Specifically, sir, did you make an analysis, both quantitatively and qualitatively, of these packages which I hand you, People's Exhibit 6, 7, 8 and 9, marked for identification? [handing to the witness]—A. Yes, I did.

Q. With respect to People's Exhibit 6 for Identification, what did you find that package to contain, after making the chemical analysis?—A. I found it to contain 28.3 grams of powder, containing 30% of heroin.

Mr. GELB. 28 what?

Mr. LAPPANO. 28.3 That is 28 and 3/10ths grams.

Mr. GELB. How many grams in an ounce?

Q. How many grams to an ounce?—A. 28.35 grams.

Q. How many grams make an ounce?—A. 28.35.

Q. And 35. So this package Number 1 had exactly one ounce less 5/100ths. Is that right?—A. That is correct.

Q. Of 30% heroin?—A. Yes.

Q. That is to say, the alkaloid known as heroin you found in that mixture to be 30%?—That is correct.

[102] Q. Is that avoirdupois weights you are talking about?—A. Yes.

Q. With respect to People's Exhibit 7 for Identification, did you examine the contents of that package?—A. I did.

Q. And what did you find that to contain?—A. 26.7 grams of powder, of which 30% is heroin alkaloid.

Q. And that is also avoirdupois weight?—A. Yes.

Q. Now, with respect to——A. That's—pardon me. That's grams is the centigrade weight.

Q. What is that?—A. Grams is a unit of the metric system.

Q. Yes; I understand that——

The COURT. Now, the two packages together——

Mr. LAPPANO. There is another one, Judge.

The COURT. All right.

Q. The third one there, People's Exhibit 8: Did you examine the contents of that?—A. I did.

Q. And what did you find that to contain?—A. 7.8 grams.

Q. Of what?—A. Of powder, of which 18% is heroin.

Q. Now——

Mr. GELB. Before you get to the cocaine——

Mr. LAPPANO. Yes?

Mr. GELB. He said "Grams is metric weight."

Mr. LAPPANO. That's right. The gram is the metric weight.

Q. How many grams make an ounce of avoirdupois weight?—A. 28.35.

[103] The COURT. Taking the three packages together, and counting up the grams, how many ounces avoirdupois would it be?

The WITNESS. The total weight of the three packages is 2 ounces and seven-thirty-seconds of an ounce avoirdupois.

Q. The heroin?—A. Total weight of the powder.

Q. Of the heroin?—A. Total weight of the powder.

Q. The powder?—A. Yes.

The COURT. The total weight of the powder which you found to contain the various proportions of heroin, you say that that totals 2 ounces avoirdupois?

The WITNESS. Yes your Honor.

Q. That is two and seven-thirty-seconds part of an ounce?—A. That is correct.

Q. Now with respect to this Exhibit 9, People's exhibit No. 9 for Identification: Did you examine the contents of that package?—A. I did.

Q. What did you find that contained?—A. I found it contained 18 capsules, weight 44 grains, containing cocaine.

Q. 44 grains is the equivalent to what part of an ounce avoirdupois?—A. Approximately three-thirty-seconds of an ounce.

Q. Three-thirty-seconds of an ounce.

The COURT. Now, can you total the packages, the heroin [104] powder and the cocaine? What would the total be in avoirdupois?

Mr. LAPPANO. Before that, might I ask him, your honor? It was a mixture, this was a mixture of powder and cocaine, or was it pure cocaine?—A. The powder contained cocaine.

Q. Do you know what percentage?—A. No.

Q. You didn't analyze it for that?—A. No.

Q. So that we don't know how potent those 18 capsules were, as to what percentage of it was cocaine?—A. That is correct.

Q. And how much was powder?—A. Yes.

Q. That's right? You did not make an analysis?—A. I did not make a qualitative analysis of the capsules containing the heroin.

Mr. GELB. You mean a quantitative analysis.

The WITNESS. Yes, quantitative analysis.

Q. How many grains are there in an ounce?—A. 437.5 grains to an ounce avoirdupois.

Mr. LAPPANO. I think that's all.

Cross-examination by Mr. GELB.

Q. Why didn't you analyze the cocaine?—A. It wasn't at all necessary.

Q. I don't get you.—A. I make a quantitative analysis [105] of narcotics, up to above 2 ounces. Beyond that it won't serve any purpose whatsoever.

Q. Weren't you given that to make an analysis both quantitatively and qualitatively?—A. I was given that to make an analysis so that—as charged under 1751, Section 3, which says, the way I understand it, that if the seizure is over 2 ounces——

Q. You are a chemist. Look, I am interested——

The COURT. The witness, Mr. Gelb, states that once he finds over 2 ounces, he doesn't go into the quality of the balance.

Mr. GELB. How do we know it is cocaine then, the balance? After all, it is offered here as cocaine.

The COURT. How do you know there was any cocaine in it?

The WITNESS. I make a qualitative analysis of all the remaining substances in that particular evidence.

Q. And what did it show?—A. It showed that it contained cocaine.

Q. If you make a qualitative analysis, you would have the percentage of cocaine?—A. No. A qualitative means the kind, not the quantities.

Q. What else did it have besides cocaine?—A. I just make an analysis for the narcotic content.

Q. What was the narcotic content?—A. Cocaine.

[106] Q. What? One-one-thousandths of it cocaine?—A. I did not make a quantitative analysis of the capsules.

Q. In other words, in your chemical analysis you found some cocaine in that?—A. Yes.

Q. In that particular package?—A. That is correct.

Q. But you don't know what percentage at all?—A. Correct.

Q. Just out of curiousity?—A. No, sir.

Q. You don't do that?—A. No. That is the regular procedure I follow in the laboratory. If a seizure is 10 pounds, I only make a quantitative analysis of 2 ounces of the 10 pounds.

Q. You made a quantitative analysis of 2 ounces and more here?—A. I made an analysis of powder which will bring the quantity above 2 ounces.

Q. But you said if you had 10 pounds you would only make an analysis of 2 ounces.—A. A quantitative analysis of a little above 2 ounces.

Q. You said 2 ounces out of 10 pounds. Now, you made a quantitative analysis of more than 2 ounces.—A. Sir, I would make a qualitative analysis of the remaining material——

Q. I am just curious to know. Can you tell us at all how much cocaine there is in that? What percentage there is in People's Exhibit 9?—A. There is considerable cocaine but I don't know the exact percentage.

Q. Are you guessing now?—A. No. The tests were very obvious and very apparent.

[107] Q. "Considerable." If I ask you a few more questions, I suppose you will be able to give me the percentage.—A. Impossible.

Q. When you say "considerable," what does that mean?—A. I mean the test—if you get a trace of cocaine, you have difficulty in getting the tests.

Q. How much do you need in order to get the test to show cocaine?—A. If a sample contains above 5%, you have no trouble at all.

Q. So you got 5%, or what?—A. As I said before, I did not make a quantitative analysis of the cocaine samples.

Mr. GELB. All right.

Redirect examination by Mr. LAPPANO:

Q. Insofar as this cocaine is concerned, do you know what that is derived from?—A. That is derived from the cocoa plant.

Q. And so far as the heroin is concerned——

Mr. GELB. Is this for the purpose of showing it is a drug in violation of law?

Well, you can't prove it as to the cocaine; heroin, only.

Mr. LAPPANO. I can prove it also as to the cocaine.

Mr. GELB. That is just the reason I asked.

I object to it. You can't prove it as to the cocaine.

Isn't that right?

[108] Q. What was the answer?—A. Cocaine is a derivative of the cocoa plant.

Q. Insofar as the heroin is concerned, it is derived from what?—A. It is derived from morphine, which is derived from opium.

Q. Now, may I ask you this: As a chemist, do you know whether or not heroin may be purchased or possessed by anyone even legally here in this country?—A. No one in the United States is allowed to possess it, except law enforcement officers in the performance of their duties, the way I understand it.

Q. Specifically, is that your understanding? That even a physician cannot possess heroin?

Mr. GELB. Wait a minute. His understanding doesn't mean anything.

Q. Do you know that——

Mr. GELB. Wait a minute. I concede that whatever heroin was possessed here was possessed in violation of the law.

Mr. LAPPANO. Well, I want to go further than that.

Mr. GELB. Why do you have to go further.

Mr. LAPPANO. Your Honor, there is a statute—it is a Federal statute—that forbids the importation of heroin, and forbids its manufacture.

Mr. GELB. I agree with you.

Mr. LAPPANO. And there isn't any place—and if Mr. Gelb [109] will concede——

Mr. GELB. Yes.

Mr. LAPPANO. There isn't any place where it may be legally purchased for any legitimate purpose——

Mr. GELB. Of course, I agree.

Mr. LAPPANO. O.K.

Mr. GELB. I said that.

Mr. LAPPANO. All right, thank you.

Judge, before we adjourn, I have to offer these in evidence, and I haven't done so.

Mr. GELB. No objection. Except the cocaine. I object to 9.

Mr. LAPPANO. I am offering it in evidence.

Mr. GELB. I say I object to Exhibit 9.

Is that the cocaine?

Mr. LAPPANO. That is the cocaine.

Mr. GELB. I object to its admissibility.

The COURT. Objection is overruled.

Mr. GELB. 9, I am referring to.

The COURT. Yes. Objection is overruled.

Mr. GELB. Exception.

The COURT. Mark them in evidence.

Offers in evidence

(The 4 packages heretofore above referred to, marked People's Exhibits 6, 7, 8 and 9 for Identification, were [110] received in evidence and marked respectively People's Exhibits 6, 7, 8 and 9 in Evidence.)

Mr. LAPPANO. May I have a concession that this is milk sugar? (producing jug).

Mr. GELB. Yes.

Mr. LAPPANO. I now offer this in evidence too, this milk sugar.

The COURT. Mark it in evidence.

(The jug and contents heretofore marked People's Exhibit 10 for Identification, was received in Evidence and marked People's Exhibit 10 in Evidence.)

Mr. LAPPANO. And that it was examined by the chemist, and that it was milk sugar?

Mr. GELB. Yes.

The COURT. Members of the Jury: You are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you. Be on hand here at 11 o'clock tomorrow morning. Convene in the Juryroom adjoining the Courtroom.

(Thereupon the further trial of the case was adjourned to the following morning, February 1st, 1951, at 11 o'clock.)

[111] February 1, 1951.

Same appearances.

Benjamin J. Fitzgerald, Federal Agent, Bureau of Narcotics, 90 Church Street, New York, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. LAPPANO:

Q. Mr. Fitzgerald, how long have you been a Federal Narcotic Agent?—A. More than three years.

Q. Are you assigned to the local New York offices?—A. Yes.

Q. And were you so assigned on December 21, 1950?—A. Yes, sir.

Q. On that date did you go to premises 527 West 134th Street, Apartment 12, here in the County of New York?—A. Yes, sir.

Q. Do you recall approximately what time it was that you went there?—A. Yes, sir.

Q. What time was it?—A. I left my office at about a quarter to one, and I arrived there about a quarter after one.

Q. When you got to this Apartment 12, did you get there alone, did you go there alone?—A. No. There was another Agent with me.

Q. Did you both enter the premises?—A. Yes, sir.

Q. And who was that other Agent?—A. Joseph Ferro.

[112] Agent Ferro.

Q. Did he remain there?—A. With me, yes.

Q. With you. Now, when you got there, who, if anybody, did you see in that apartment?—A. When I arrived there, Detective Schein opened the door. I walked into the apartment. I saw an elderly woman, a young child, the defendant, George Angelet, Detective O'Brien.—That's all. Oh, and his wife, Angelet's wife.

Q. As you entered the apartment where did you go in that apartment?—A. I went to the rear of the apartment, which is in the front of the house actually.

Q. What room was that? What type of room?—A. It is a bedroom.

Q. When you got into that bedroom who, if anyone, was in that bedroom?—A. Well, Detective O'Brien, the defendant Angelet, and Detective Schein.

Q. When you got into that bedroom did you see anything in that room?—A. Yes, sir.

Q. What did you see?—A. On the bed I saw a scale, a stapling machine, staples, empty capsules, and glassine bags.

Mr. LAPPANO. May I have those exhibits, Mr. Clerk, please?

The CLERK. Yes.

(The exhibits are handed to Mr. Lappano.)

Q. I show you these 54 envelopes, marked People's Exhibit 1 in Evidence. [Handing to witness.] Do these look [113] like the envelopes you saw there on the bed?—A. Yes, sir.

Q. I show you these empty capsules, totalling 108, I think it was in number, constituting People's Exhibit 2 in Evidence. Do these look like the capsules that you saw there?—A. Yes sir.

Q. I show you this stapling machine, marked People's Exhibit 3 in Evidence, and ask you does that look like the stapling machine you saw there on the bed?—A. Yes, sir.

Q. I show you the package of staples, marked People's Exhibit 4 in Evidence, and ask you whether that looks like the box of staples you saw there on the bed?—A. Yes, sir.

Q. I show you this scale, marked People's Exhibit 5 in Evidence, and ask you does this look like the scale that you saw there on the bed?—A. That's it.

Q. Now, as you entered that room, did you talk to anyone in the presence of this defendant?—A. Yes, I had a conversation with the Detectives. And then I proceeded to search the apartment.

Q. Before you searched the apartment, did you speak at all to the defendant? Did you say anything to him, if you remember?—A. Not that I remember.

Q. All right.—A. I remember saying "hello" to him.

Q. Then you say you proceeded to search?—A. I proceeded to search. Yes sir.

Q. And was Detective Schein and Detective O'Brien [114] also in that room?—A. Yes, sir.

Q. Did you find anything?—A. Yes, sir.

Q. What was the first thing you found?—A. The first thing I found was a jug of milk sugar. I found that in a drawer, in a chest of drawers.

Q. I show you this jug containing milk sugar, marked People's Exhibit 10 in Evidence, and ask you whether that looks liks the jug that you found?—A. It does.

Q. When you found this jug, what, if anything, did you do with it?—A. I placed it on the bed with the other paraphernalia that had already been placed on the bed; that paraphernalia which is used ordinarily by dope peddlers to package drugs.

Q. Did you find—

Mr. GELB. I move to strike out the last few words.

Mr. LAPPANO. I agree.

The COURT. Strike that out.

Q. After you found that jug containing this milk sugar, did you say anything to anybody, in the presence of the defendant, or to the defendant, that you recall?—A. No. Not that I recall.

Q. Now, did anyone else there say anything to the defendant concerning that jug containing milk sugar?—A. Oh, I believe Detective O'Brien said to the defendant Angelet, "What do you use this for?"

[115] Q. Did Angelet answer?—A. Angelet said "You know what I use it for."

Mr. GELB. "You know" what?

Mr. LAPPANO. "You know what I use it for."

Q. Anything more along that line?—A. Well, Detective O'Brien pressed him. He said, "Well, what do you use it for?" He said "I use it to cut drugs with."

Q. All right. Now, then did you continue your search of that room?—A. Yes, I did.

Q. Did you find anything else?—A. Yes, I did.

Q. What did you find and where?—A. On top of a cabinet, a clothes cabinet, there were two or three hat boxes. And in one of those hat boxes, underneath the hats, I found four packages—four cellophane envelopes. I took them out and I said, "Look at this." And Detective O'Brien took them away from me, took the evidence from me, and put it on the bed, and he held up one package, one one-ounce package——

Q. Just before that, please, Officer: When you found these four packages, as you have testified, did the defendant say any-

thing concerning them?—A. I believe he said "You've got it."

Q. "You've got it"?—A. Yes.

Q. Then you say that O'Brien took these four packages?—A. That's right.

Q. Now what did O'Brien do with them? What did he say, [116] if anything, to the defendant, and what did the defendant say to him, within your hearing?—A. Detective O'Brien held up one of the one-ounce packages in his hand, and he said to the defendant Angelet, "What's this?" Angelet said, "That's H." O'Brien said, "What do you mean by H?" He said, "That's heroin." He said "How much is it?" And Angelet said "An ounce."

So then Detective O'Brien held up another package, and he said, "What's this?" and Angelet said, "That's H." O'Brien said "What do you mean by H?" And Angelet said, "Heroin". O'Brien said, "How much?" Angelet said, "An ounce."

Then Detective O'Brien held up the third package. He said to Angelet, "What's this?" Angelet said, "That's H." O'Brien again said, "What do you mean by H?" Angelet said "That's heroin." And he said, "How much is in this package?" Angelet said, "That about a half. Maybe less than a half ounce."

Then O'Brien held up the fourth package and he said to Angelet, "What's this?" Angelet said, "That's cocaine." And O'Brien said, "How many caps are in there?" And Angelet said, "About 18."

Q. Will you, in your own way, continue to tell us what else you said, if anything, to the defendant, or what [117] O'Brien said to him, concerning these four packages that you talked about?—A. Yes, sir. Well, after that I asked Angelet where the rest of the stuff was. And he said, "You got it all. There isn't any more." And then I asked the defendant Angelet if he was hooked.

Q. What does that mean?—A. That means if he's addicted to narcotics.

Q. What did he say to that?—A. Angelet said, "No, I'm not crazy. I'm bad enough off as I am, without using that stuff."

And then I asked the defendant Angelet where he got the stuff. So he said, "I am not turning anybody in. I have been in this racket a long time. Nobody turned me in, and I am not turning anybody else in."

Then after that there was a conversation about his bedroom. He told us that he had to sleep on a separate bed because of his injury; he had to sleep on some kind of a hard bed. O'Brien was questioning him then. And I heard him mention about the bed being hard, that he had to sleep in that room and that that was his bedroom.

Q. I show you now this package, People's Exhibit 6 in evidence, a package of white powder, and ask you to tell us, whether that, aside from the seals in the brown paper—whether that looks like the package that you referred to as one of the four packages that were found by [118] you where you just testified you found it.—A. Yes sir, it does.

Q. I now show you this package, containing a white powder, marked People's Exhibit 7 in Evidence, and ask you to tell us whether that looks like one of the other packages that you say you found where you testified. Of course, always with it the brown paper seals on it.—A. Yes, it does.

Q. I now show you another package, marked People's Exhibit 8 in Evidence, and ask you to tell us whether that looks like one of the packages that you found where you say you have testified?—A. Yes, it does.

Q. I now show you this package, marked People's Exhibit 9 in Evidence, and ask you whether that looks like one of the packages you say you found?—A. Yes, sir, it does.

Q. Now, do you recall any further conversation concerning these drugs with the defendant, either by you or by any of the other officers with the defendant?

Mr. GELB. What was the last question? I missed it.

The COURT. Mr. Roven, will you read it?

(The question was read as recorded.)

A. Not offhand, I don't.

Q. Then what did you do?

Mr. GELB. Did he give any conversations concerning the drug used?

Mr. LARPANO. Yes, he has already testified.

Mr. GELB. About the drugs?

Mr. GELB. He said "H."

Mr. LAPPANO. Do you want to have it read?

Mr. GELB. I mean I didn't hear. I thought I was watching——

Mr. LAPPANO. May the stenographer read that back to him? After he found——

Mr. GELB. Yes, I am curious.

(The stenographer reads the portion of the testimony, as recorded.)

Mr. GELB. Now, is there any other conversation?

Mr. LAPPANO. I just asked him was there any other conversation that took place, either by him with the defendant, or by any of the other officers with the defendant?

Q. And I think you said what?—A. I don't recall any more. There may be, but I don't recall.

Q. Did you then leave the apartment?—A. Yes, we all left: Schein, O'Brien and Angelet and myself and Agent Ferro.

Q. Did you have your own automobile?—A. I had my own Government car; yes, sir.

Q. Who went with you?—A. Agent Ferro.

Q. And did you see where Schein, O'Brien and Angelet went?—A. Yes.

Q. Where did they go?—A. They went over to the local precinct.

[120] Q. I mean did they go in a car?—A. They went in Schein's car.

Q. Did you follow them?—A. Yes.

Q. That precinct is located where? Do you remember?—A. Amsterdam Avenue, around 136th Street.

Q. Well, that is the 30th Precinct, was it?—A. That's right.

Q. And did you go to the Precinct?—A. Well, I didn't go in. I just followed them up and when I saw them go in then I——

Q. Then you went off?—A. Yes.

Q. You didn't go into the precinct at all?—A. No.

The COURT. Before you left the defendant's apartment, do you recall anything—any incident about some money?

The WITNESS. No—no.

Q. May I put it to you this way? Did you see any money counted out and given to Mrs. Angelet?—A. Well, there was—I remember, the defendant Angelet was counting out a large sum of money to his wife.

Q. Do you know how much money that was?—A. No, I don't know how much it was.

Q. You saw him counting out money. Do you remember how much it was?—A. No, I don't. I was searching the place. I thought there were more drugs in there.

Q. But you do remember seeing Angelet counting out some [121] money?—A. That's right.

Q. Officer Fitzgerald did you go to Apartment 12 as the result of a telephone call that you received to go there?—A. Yes, I did.

Q. And your role in this situation was to assist in the search of this apartment, is that correct?—A. That's right.

Q. And that's all you did?—A. Yes.

Q. You didn't make the arrest?—A. No, I did not make the arrest.

Q. Did you, or any of the other officers, within your hearing, question Angelet as to how long he had been in this racket?—A. Detective O'Brien asked him how long he had been in the racket, and I believe his response was—he said "Oh, a long time, about 4 or 5 years."

Mr. LAPPANO. I think you may inquire, Mr. Gelb.

Cross-examination by Mr. GELB:

Q. By the way, when you got through with this search, and when you left the apartment, did you make notes?—A. Not right away I didn't.

Q. Well, did you make notes?—A. No, subsequently I made notes. I made a daily report of it. I make a daily report.

Q. Then when you got through you made notes?—A. I don't mean that day.

Q. Maybe next day?—A. No.

[122] Q. You mean you did not write anything down?—A. Not right away, no.

Q. Who said anything about "Right away"? Subsequently?—A. Subsequently I made a case report.

Q. How much later?—A. About a week later.

Q. Have you got any of your notes concerning this?—A. No.

Q. Don't you usually write down what the defendant says, what conversation there is?—A. No.

Q. You mean you are not supposed to take notes?—A. Not if I can remember what is being said, I don't have to take notes.

Q. Now in this case, after December 21st, you had no idea when it would be tried?—A. That's right.

Q. And you had no idea how many more cases you would have between then and the time this case came to trial?—A. That's right.

Q. You say now "If I could remember." So you assumed you could remember indefinitely?

Mr. LAPPANO. I object to that if your Honor please.

The COURT. Objection sustained.

Q. Well, you said, "Not if I could remember would I take notes"?—A. That's right.

Q. Well, how did you know you could remember?—A. I know. I could remember this.

Q. No matter how long after?

[123] Mr. LAPPANO. I object to this, if your Honor please.

Mr. GELB. I don't get that. I wish I knew——

Mr. LAPPANO. The fact of the matter is, it only happened on December 21st.

Mr. GELB. What difference does that make? He said he takes notes—he doesn't take notes because he thinks he could remember. And I want to know for how long he thinks he could remember.

Mr. LAPPANO. I object to that, if your Honor please.

The COURT. Objection sustained.

Mr. GELB. I wish I knew the basis for the objection,—I could better understand it.

The COURT. I say nobody knows how long he is going to remember something.

Q. So you say, regardless, then, of how long after the case may come up—what? You don't take notes?

Mr. LAPPANO. I object, if your Honor please.

The COURT. What is the question?

Mr. GELB. You say you don't take notes?

Mr. LAPPANO. The first part of the question.

The COURT. Just a minute.

Mr. GELB. I am past that. I will put it again.

Mr. LAPPANO. All right.

Q. You don't take notes?—A. I write a case report about a week or so later.

[124] The COURT. Tell us what a case report is.

The WITNESS. A case report is a report of the case.

Q. Does it include conversation had with defendants?—A. Sometimes.

Q. Why sometimes and why not other times?—A. Sometimes the defendant wouldn't say anything.

Q. When he does say anything, does it include conversations with defendants—A. Yes it does if it is damaging conversation.

Q. Did you put down in the case report conversations with this defendant?—A. No, I didn't.

Q. Were they damaging conversations, to your mind?—A. Yes, they were. Well, this case was not being prosecuted in the Federal Court.

Q. But you made a case report?—A. That's nothing.

Q. But you didn't put down in your report any conversations that you testified to here today?—A. No, no.

Q. As a matter of fact, you are trained for some period of time before you are given the job, aren't you?—A. No.

Q. Before you go out on the job?—A. No, I am not.

Q. You are not trained to be a Narcotic Agent?—A. That's right.

Q. You mean——— A. You get your training on the job.

Q. Right on the job?—A. Yes.

Q. You are instructed, aren't you?—A. No.

[125] Q. Nobody instructs you?—A. No.

Q. About your duties?—A. There is no such thing as a school for narcotics.

Q. I didn't say anything about a school.—A. Or instructions for Narcotics Agents.

Q. Your superior does not instruct you at all?—A. No. You read literature on it. You more or less instruct yourself, and you go out with older Agents and learn by experience.

Q. When you learned, don't you know that you are not supposed to break into a house—A. Yes.

Q. Incidentally, did you speak to Schein and O'Brien before they went up to this apartment?—A. No.

Q. You did not?—A. No.

Q. You never discussed this defendant with Schein and O'Brien?—A. Oh, I have discussed him many times with Schein and O'Brien.

Q. Before they went up to this apartment?—A. On this particular day?

Q. Before they went up, did you know they were going?—A. No.

Q. When they called you, did you know why they called you?—A. Yes.

Q. They wanted you to find narcotics?—A. No.

Mr. LAPPANO. I object to this, if your Honor please.

Mr. GELB. That is a question——

[126] The COURT. He said "no."

Q. What did they call you for?—A. Well, because this guy is an international character, and I'm a Federal Agent and I am interested in people who are involved in national and international transactions in narcotics.

Q. They called you because he is an international character?—A. That's right.

Q. That is why they called you?—A. That's right.

Q. Didn't they call you to search for narcotics?—A. In addition to that. That was a secondary reason.

Q. That was a secondary reason. What was the first reason? They called upon you to do what?—A. Well, they called up because they wanted Federal Agents there, because——

Mr. GELB. Wait a minute.

Mr. LAPPANO. Let him finish.

May we have this witness finish his answer?

Q. Go ahead.—A. They called us because they wanted Federal Agents there; because they knew that we knew that this fellow is a character who is involved in smuggling and other international operations.

Q. You have testified how many times in Court?—A. Oh, many times.

Q. You know, you volunteered very damaging testimony.

Mr. LAPPANO. Your Honor, I——

[127] Mr. GELB. Wait a moment, now, I am testing his good faith.

Mr. LAPPANO. I am objecting because you have asked the question, and the answer that he gave is responsive to your question.

Mr. GELB. I beg your pardon. I asked him what he went up there for.

Mr. LAPPANO. He is telling you, and you say why?

Mr. GELB. Please, have you got an objection to this question?

Mr. LAPPANO. I am objecting, your Honor.

The COURT. Objection overruled.

If the answer had not been responsive, Mr. Gelb would have moved to strike out the answer. He did not move.

Mr. GELB. Your Honor, I must say: Damage was done. There was no point in my moving to strike out the answer.

The COURT. All right.

Mr. GELB. What is the question?

(The question was read as follows: "You know, you volunteered very damaging testimony.")

Mr. LAPPANO. That is the part I am objecting to, if your Honor please.

Mr. GELB. Yes, I know.

The COURT. Well, I will overrule the objection.

Do you know whether you volunteered it, or whether you [128] were answering a question?

The WITNESS. Well, the volunteering of it came within the answer to the question.

Q. O.K. You said you went up there for two reasons: One reason was to look for narcotics?—A. That's right.

Q. What was the second reason?—A. The second reason, was to question Angelet about his activities.

Q. You didn't?—A. No. He wouldn't answer. He was unresponsive.

Q. You testified here you didn't ask him any questions—A. I did ask him questions.

Q. What questions did you ask him?—A. I asked him where he got the stuff.

Q. O'Brien asked him that?—A. I asked him that.

Q. But he too?—A. All right, he too.

Q. What else did you ask him?—A. I asked him whether he was hooked.

Q. O'Brien asked him that too.—A. I asked him where the rest of the stuff was.

Q. He said "No"?—A. I was satisfied when he gave me the answer to the question that when I asked him "Where did you get this stuff?", and he refused to answer, I was satisfied he wasn't going to talk.

Q. Incidentally, why didn't you go up there in the first place?—A. I didn't think he would be silly enough to have over two [129] ounces of "junk" on him—heroin, narcotics.

Q. But you sent Schein and O'Brien up?—A. I did not.

Q. Didn't you suggest it to them?—A. No I didn't. I didn't even know they were going up there.

Q. In other words, you are talking about an international what? An international what?—A. Smuggler.

Q. Of what? Dope?—A. Cocaine.

Q. Of narcotics?—A. Right.

Q. Heroin too?—A. That's right.

Q. And cocaine?—A. Right.

Q. You have known him as an international smuggler of heroin and cocaine?—A. Right—I wouldn't exactly call him a smuggler, but he is the primary source for obtaining drugs from smugglers in this country, and to my knowledge, and to my mind, and to my information, he obtains drugs from these xxxx Puerto Rican and Spanish seamen in New York here, and distributes it.

Q. And you wouldn't go to his house to look for it?—A. I didn't think he would carry it in his house.

Q. You didn't even make an attempt to?—A. No. I know hundreds of people like him——

Q. Wait a minute. You wouldn't make an attempt, would you?—A. No.

Q. All you testified to is hearsay?—A. I might make an attempt——

[130] Q. All you said is hearsay?—A. What do you mean all I said is hearsay?

Q. When you said "He is known as"?—A. That's right.

Q. Right?—A. Yes.

Q. Are you a lawyer?—A. Yes.

Q. You know that is not admissible?—A. Well——

Mr. LAPPANO. I object to that.

Mr. GELB. Please——

Mr. LAPPANO. "Please" too, Mr. Gelb. Will you let me make my objection?

Mr. GELB. Make your objection. There are some things I think are almost elementary.

Mr. LAPPANO. Well, I object to that.

Mr. GELB. Testing his credibility.

The COURT. Objection sustained.

Mr. GELB. May it please your Honor, I am cross-examining a witness——

The COURT. Proceed with your next question.

Mr. GELB. Let me point out: If I am cross-examining a witness' credibility, I don't care whether it is an Agent or anybody else, if he knew something was hearsay, I have a right to find out why he said it.

The COURT. Well, ask him.

Mr. GELB. Well, first I asked him if he is a lawyer and if he knew it is hearsay. That's all.

[131] The COURT. When you asked him——

Mr. LAPPANO. But Mr. Gelb has a perfect right to get hearsay information if he wants it. He is eliciting it. I am not.

Mr. GELB. He blurted out something——

The COURT. Gentlemen, the jury will disregard this colloquy between counsel.

Mr. GELB. All right.

Q. I see you're a lawyer.—A. That's right.

Q. You know that the testimony you gave concerning his reputation, or what you think of it, is hearsay?

Mr. LAPPANO. I object to that, if your Honor please.

The COURT. Objection overruled.

A. Well, I am testifying as to something that is within my knowledge.

Q. You know it is hearsay? I ask you again.—A. Well, some of it is, and some of it isn't.

Q. I don't want to test you on the rules of evidence, or anything like that; but you don't think it's all hearsay?—A. No.

Q. You never arrested this man for possessing or selling narcotics?—A. No.

Q. You knew he had never been arrested for selling or possessing narcotics?—A. I knew he had never been arrested. [132] Right. For selling.

Q. Either?—A. Or possession. That's right.

Q. Right?—A. That's right.

Q. Did you have him under observation?—A. Yes, sir.

Q. When?—A. When? Not too long ago.

Q. When?—A. About two months ago, I would say.

Q. Where?—A. Around 84th Street and Columbus Avenue.

Q. What time of the day or night?—A. It was about 1 o'clock. Detective Max Renner and I had the defendant under observation.

The COURT. A.M. or P.M.?

The WITNESS. P.M.

Q. Did you send anybody over to him?—A. No.

Q. I mean when I say "send anybdoy over", one of your confidential informants?—A. Oh, no. No.

Q. Somebody perhaps with a criminal record?—A. No.

Q. To buy or attempt to buy?—A. No.

Q. You customarily do that?—A. Sometimes.

Q. Yes. But you didn't. All right. How long did you observe him?—A. For a short period of time. He arrived in an automobile and took off again.

Q. Did you observe him after that?—A. No.

Q. Did you observe him before that?—A. Oh, I observed him many times.

Q. When?—A. About three years ago I would say.

Q. After—that is, three years ago you observed him? [133] A. Yes. Well, over a period of time I observed him about five or six different times I would say.

Q. Did you ever send anybody over—did you ever attempt to get him to make a sale?—A. No.

Q. Did you ever observe him doing anything that would cause you to make an arrest?—A. No.

Q. Now when you say you "observed" him: you said, first, about three months ago?—A. Yes.

Q. Now, before that, how long ago?—A. Before his accident. I observed him a few times before his accident.

Q. That is two years ago?—A. Yes.

Q. Then in the last two years you didn't observe him?—A. Well, I observed him——

Q. Once?—A. No; more than once.

Q. You said———A. About twice after his accident.

Q. Where was the other one?—A. You mean by "observation", actually watch him?

Q. I mean doing your duty, whatever you are supposed to do?—A. Yes; I have observed him. I said, about five times. I have seen him many times.

Q. I am talking about the last two years.—A. About twice.

Q. Once on 80 some odd street?—A. That's right.

Q. The other time?—A. Around Carmen's, that is around Fifth Avenue, or 111th Street.

Q. That is for how long did you observe him that time?—A. Oh, about an hour.

[134] Q. Did you see him do anything that would interest you?—A. Yes.

Q. Yes?—A. Yes.

Q. What did he do?—A. He—one time he had a conversation with a character that I am very interested in.

Q. You saw his speak to some man you are interested in?—A. That's right. A criminal.

Q. What else?—A. Well, then parted. That's all. They had a lengthy conversation, and they left.

Q. And he spoke to a character you were very much interested in?—A. That's right.

Q. But you didn't follow it up, did you?—A. What do you mean follow it up? What could I do about it? So he had a conversation.

Q. You just casually watched him once, on that occasion, and another time was a few months later on another occasion?—A. What do you mean "Casually"? If I saw him hand a package—one man hand a package to another, I could make an arrest on that basis.

Q. You know how investigations are made?—A. You say "Casually".

Q. You concentrate on a personality, don't you?—A. That's right.

Q. You concentrate sometimes for months.—A. Sometimes.

[135] Q. Right?—A. Sometimes.

Q. In the last two years you observed him once three months before December 21st, for about what? An hour? Or less?—A. About an hour. I didn't see him do anything.

Q. The other time was how many months before that?—A. About a month before that.

Q. So I say here is this character whom—this man whom you characterized here in terms very prejudicial to him. Right?—A. No, I wouldn't say so. In terms of the truth. I am not being prejudicial against the defendant.

Mr. GELB. I move to strike it out, and ask the Jury to disregard it.

You can't——

The COURT. Strike it out.

Q. The law speaks the truth. You know that, don't you?

Mr. LAPPANO. I object to this, if your Honor please.

Mr. GELB. I think it is an impertinence for him to say that.

The COURT. Is that objected to?

Mr. LAPPANO. I object to that.

The COURT. Objection sustained.

Q. I say you did not conduct a full-scale investigation?

Mr. LAPPANO. I object to that as already been answered.

[136] The COURT. Objection overruled.

Q. Did you?—A. No. I never conducted a full-scale investigation.

Q. What kind of an investigation? Outside of what you have told us, did you conduct anything else?—A. Well, I always had him in mind, I might say. You see——

Q. In other words, you had———A. I was always seeking information on him.

Mr. GELB. I don't want him to say more that is hearsay. That is why I cut it off.

The WITNESS. I was always seeking information.

The COURT. You asked the question what other investigation did he conduct, so you opened the door.

Mr. GELB. He can tell me what he did. I don't mind that.

Q. Did you tap his wire?—A. No.

Q. Why are you smiling? I don't get it. What is the point? I would like to know what you——

Mr. LAPPANO. May I object to that?

The COURT. Maybe under the Federal law——

The WITNESS. Under the Federal law it is illegal.

Mr GELB. The Attorney General announced he is tapping 159 wires. So the smile doesn't mean anything. It is illegal, but the Attorney General is tapping 159 wires.

Mr. LAPPANO. I ask that remark be stricken out. It has no place here.

[137] The COURT. All right, strike it out.

Q. Under the Federal law, you are not supposed to break into a house?—A. Under any law you are not supposed to break into a house.

Q. But under Federal law if you went in without a search warrant, the evidence would not be admissible?—A. Yes.

Mr. LAPPANO. May I respectfully object?

The COURT. Objection sustained.

Mr. GELB. Wait a minute. I got a point.

The COURT. Objection sustained.

Instead of starting to plead with me, will you make your objection and I will rule.

Mr. LAPPANO. O.K.

Q. All right. You made no notation of what was said up in that place?—A. No.

Q. Is that right?—A. That's right.

Q. And you remember it?—A. Yes, pretty well.

Q. Just out of memory?—A. That's right.

Q. And you have made a number of arrests since?—A. Yes.

Q. How many have you made since December 21st? How many have you participated in?—A. About three, I would say. Two or three.

Q. Do you remember conversations in those?—A. Well, if I have time to think about them, I could.

Q. I see.—A. Yes.

[138] Q. You mean that is the way you are going to do it from now on too?.

Mr. LAPPANO. I object to this, your Honor.

The COURT. Objection sustained.

Q. When you first found the milk sugar, the defendant—before you found the cocaine or heroin, he admitted to you he is using this to cut drugs?—A. The defendant—when I found the milk sugar, Detective O'Brien said to Angelet, "What do you use this for?" and Angelet said "You know what I use it for", and then Detective O'Brien said, "Well, tell me." He said, "I use it to cut drugs with."

Q. I thought you asked him that. I thought you testified you asked him that. Right? That he said, before the heroin or cocaine was found, he said "I use this to cut drugs with."—A. That's right.

Q. Not in the past, but in the present, right?—A. Right.

Q. And you hadn't yet found the drugs; and he was admitting he is cutting drugs?—A. Yes.

Q. Are you sure about that?—A. I am telling you what he said.

Q. I say, you are sure he said that?—A. Yes.

Q. By the way, were you interested in finding a gun there?—A. No.

Q. Did you know anything about a gun?—A. No.

Q. Nothing at all?—A. No.

[139] Q. Now, when you found the heroin and cocaine, the defendant said "You got it"—A. That's right.

Q. What else did he say?—A. Well, then he was questioned by Detective O'Brien—Do you want me to repeat all that testimony?

The COURT. Go ahead.

Q. Excuse me. I meant what else did he say, outside of "This is H." This is "C".—A. I think we have covered it all.

Q. That's all? Did he say anything about "Selling Narcotics is my racket."—A. Well, I asked him, "Where did you get the stuff, George?" And he said "I'm not turning anybody in. I have been in this racket a long time. Nobody turned me in and I am not turning anybody else in."

You testified to that.—A. What?

Q. I say that is not in response to my question. Is it?—A. (No answer.)

Q. That is not in response to my question.—A. I thought it was.

Mr. GELB. Read the question, please.

(Thereupon the question was read as follows: "Q. Well, did he say anything about 'Selling Narcotics is my racket?' ")

Q. Well, what I am specifically referring to: O'Brien said the defendant said "Selling Narcotics is my racket."—A. (No answer.)

Q. You didn't hear that?—A. No.

[140] Q. You say you don't put down a conversation in your report, except when you think you can't remember?

Mr. LAPPANO. I object to that, if your Honor please.

The COURT. Objection is overruled.

Q. Is that right?—A. Sometimes I put conversations down in the report. Other times I don't.

Q. I am still interested to know.—A. You see, I'll tell you, Mr. Gelb.

Q. Yes?—A. My partner keeps a diary, and in nine out of ten cases I work with him, and he writes down every little thing. He keeps a very good diary, and it takes a long time. It is a tedious task. In nine out of ten cases I work with him. And he keeps that diary, and whenever I want to refresh my recollection I just refer to his diary.

Q. Did you refresh your recollection here?—A. No; because he wasn't with me on this particular case.

Q. Then—who is your partner?—A. Leo Palier.

Q. I thought your partner was in it, and there was a man by the name of Ferro.—A. Yes, Palier was not in the office that day.

Q. But he did not keep a diary?—A. Who?

Q. This man Ferro. He is not your partner?—A. I know he didn't.

Q. Therefore, why didn't you enter it into your report?—A. It is only one case.

[141] Q. What's the difference?—A. Why should I write it down if I can remember it? It is one case. I can remember it.

Q. You could remember it?—A. Yes, I remember it.

Q. Isn't it true that when you went up there you were certain this defendant was a seller of narcotics? Isn't that true?—A. I was certain that he was a seller of narcotics.

Q. Then you weren't interested in the conversation, were you?—A. I was interested in the conversation.

Q. In remembering it?

Mr. LAPPANO. I object to it.

The COURT. Objection is overruled. The witness has answered that he was interested in the conversation.

Q. You were interested in the specific conversation had with this defendant?—A. Yes, I was interested. And by my interest I remembered it.

Q. Let me ask you this. In addition to this—just before leaving, the defendant had a conversation with the police concerning his wife?—A. Yes.

Q. What?—A. There was a conversation that the defendant had with his wife.

Q. What?—A. Not the defendant. That Detective O'Brien had with his wife.

Q. What was the conversation?—A. His wife objected to Angelet being arrested and being taken away from his home. [142] And Detective O'Brien said—Well, Angelet didn't want his wife to know why he was being arrested and why he was being taken down.

Q. Who said this?—A. Angelet.

Q. To whom?—A. To Detective O'Brien.

The COURT: What did he say about that?

The WITNESS: He said he didn't want his wife to know why he was being arrested. So Detective O'Brien said "Well, doesn't she know what you are doing?" And he said "No. I tell her I am a gambler."

Q. Incidentally, did you talk to Detective O'Brien before you testified?—A. No.

Q. I mean, not today.—A. No.

Q. How long prior to today?—A. Before Detective O'Brien testified here, I talked to him, yes.

Q. When? Yesterday?—A. Well, before the case started we all had——

Q. Did he have notes?—A. O'Brien had notes.

Q. Did he show them to you?—A. No.

Q. Didn't you ask him to look at them?—A. No, I don't want to see his notes. I couldn't read them anyway.

Q. He said, in the presence of you and O'Brien and Schein, that he was in the racket four or five years?—A. That's right.

[143] Q. Well, let me ask you, if O'Brien said he said the last couple of years, the last two years,———A. I don't know what O'Brien said.

Q. What?—A. I said I don't know what O'Brien said.

Q. But assuming he said "Two years," do you think that perhaps you might be mistaken?

Mr. LAPPANO. I object.

Mr. GELB. Well, it is—strictly speaking, you are right.

A. What do you want? My opinion whether O'Brien——

Q. In other words, I am trying to find out from you whether you are acting on the assumption that the man was a seller, right when you started, and weren't interested in remembering the details of the conversation?—A. Oh no. That is not true.

Q. But that he admitted he was a seller?—A. That is not true.

Q. As a matter of fact, when you went up there, you say you regarded him as a notorious international smuggler?—A. He is.

Mr. GELB. I move to strike that out.

The COURT. What?

Mr. GELB. I say "You say you regarded him as an international smuggler" and he said "He is." I move to strike that out.

[144] The COURT. Strike that out.

Did you regard him as such?

The WITNESS. Yes.

The COURT. Proceed.

Mr. GELB. That's all.

The COURT. All right.

Q. By the way, your partner was a man by the name of Ferro?—A. Palier is my partner. Ferro was with me that day.

Q. The one who went with you on this job?—A. Ferro, yes.

Q. Did he do anything?—A. He looked for narcotics.

Q. But was he there when the four of you———A. No. He was in another room, searching another room.

Q. Before you left? When the search ceased?—A. What about?

Q. Was he there when any discussion was being had with the defendant?—A. I would say no.

Q. You are not sure?—A. Well,——

The COURT. He said he would say no.

Q. "I would say no." I want to know, are you sure?—A. I can't tell you what the man heard.

Q. All right. But there are two—you and Ferro there?—A. Yes.

[145] Q. In the house?—A. Yes.

Q. And he was searching?—A. Yes.

Mr. GELB. All right, that's all.

*People Rest*

Mr. LAPPANO. Your Honor, that is the People's case.

(The following proceedings were had at the bench, out of the hearing of the jurors:)

*Motion To Dismiss and Denial Thereof*

Mr. GELB. For the record, I want to make a motion to dismiss the first count on the ground that the presumption under the law is unconstitutional in that the amount of two ounces has no court or any legislative finding. In other words, in statutes where presumptions are created, there ought to be a legislative finding, or somewhere a statement in the law, that experience has shown, or that there are facts to indicate, the possession of more than two ounces justifies the presumption that a man possessing it is intending to sell.

That is the legal basis of the motion.

The COURT. Motion denied.

Mr. GELB. Exception.

Will your Honor give me a five minute recess?

(Proceedings resumed aloud, in the hearing of the jurors.)

The COURT. All right. A five minute recess is [146] requested.

You are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are admonished to keep your minds open, to form no conclusions as to the guilt

or innocence of the defendant until the case is submitted to you. Take a five minute recess.

(Trial resumed after short recess.)

THE DEFENSE

George Angelet, residing at 527 West 134th Street, New York, N.Y., the defendant herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. GELB:

Q. You are the defendant in this case?—A. Yes.

Q. How old are you?—A. 25.

Q. You will be 26 when?—A. February 17, 1951.

Q. Did you go to school—Were you born in New York City?—A. Yes.

Q. Did you go to school here?—A. Yes.

Q. Did you live home?—A. Yes.

Q. When? I am talking about when you were a [147] youngster.—A. I was put away in institutions.

Q. How old were you when you were put in institutions?—A. About two years old.

Q. Did you have a father living?—A. Yes.

Q. Was he living home?—A. No.

Q. When you were young?—A. No.

Q. And you remained in institutions from when to when?—A. Until the age of 15.

Q. Through all those years?—A. Yes.

The COURT. What institutions were they?—A. Well, I was in the Catholic Protectory; St. John's; Farmingdale; Harrison Place.

Q. When you got out of the institutions at 15, what did you do?—A. I was sent home by the Children's Court.

Q. By whom? You mean with your mother?—A. Yes.

Q. Was your mother—by the way, did you have any brothers or sisters?—A. Yes.

Q. How big a family?—A. I had 5 brothers—6 brothers and 2 sisters.

Q. What did you do during the fifteenth year?—A. Well, I lived with my mother, and I was going to Chelsea Vocational High School.

Q. And how long did you stay there?—A. About 16.

Q. About a year, is that it?—A. Yes.

Q. Where were you living at that time?—A. 49 East [148] 104th Street.

Q. Then did you go out and commit a crime?—A. Yes. I didn't have no friends, or nothing. I started hanging around the street. Somebody asked me if I would go along as a lookout or something.

Q. Somebody asked you if you would go along as a lookout?

Mr. LAPPANO. I object at this time as improper direct examination.

The COURT. Objection sustained.

Mr. GELB. You mean as to all crimes?

Mr. LAPPANO. Yes.

The COURT. Please,———

Mr. GELB. I beg your pardon?

The COURT. I sustain the objection.

Mr. GELB. I wanted to ask him about his activities.

The COURT. Then ask him, without trying to go into it.

Q. Did you commit a crime when you were 16?—A. Yes.

Q. What crime was it?—A. Robbery in the second.

Q. You and some other fellows stuck up a place?—A. Yes.

Q. Is that right?—A. Yes.

A JUROR. We can't hear, Judge.

The WITNESS. Yes.—I can't talk so loud be- [149] cause my head hurts.

Q. Then you were the lookout on the job?

Mr. LAPPANO. Objected to.

The COURT. Objection overruled.

Q. Is that right?—A. Yes. Yes.

Q. And did you plead guilty?—A. Yes.

Q. To robbery in the second?—A. Yes.

Q. This was in 1941?—A. Yes.

Q. Is that right?—A. Yes.

Q. Did you commit another crime after that?—A. Yes, sir.

Q. When?—A. Two months later.

Q. What crime?—A. Burglary.

Q. What did you burglarize?—A. A flat.

The COURT. What?

The WITNESS. An apartment.

Q. Where?—A. On 107th Street.

The COURT. You mean you broke into an apartment for the purpose of stealing?

The WITNESS. Yes.

Q. Yes? Is that your answer, "yes"?—A. Yes, sir.

Q. And were you caught?—A. Yes.

Q. And did you plead guilty?—A. Yes.

Q. And were you sent to jail?—A. Yes.

[150] Q. For how long?—A. Three years.

Q. Now after you were placed on probation on the plea to robbery, and before you were arrested for burglary, a month later did you steal anything or burglarize any other place?—A. No.

Q. Are you sure?—A. (No answer.)

Q. When you went to jail, how long did you stay there?—A. Three years.

Q. When you came out, what did you do?—A. In between I was given parole.

The COURT. I did not hear that.

Q. What did you do when you got out? You served first 15 months, is that right?—A. Yes.

Q. Then you came out. Then you were sent back a short time later?—A. Yes.

Q. For violating what?—A. Parole.

Q. For breaking parole. And what did you do?—A. Well, I was arrested with a bunch of other fellows, and we were charged with robbery and assault.

Q. That did not come to trial?—A. No.

Q. So they sent you back to prison for violating your parole?—A. Yes.

Q. And how long did you stay there?—A. Another 16 months.

Q. When you came out what did you do?—A. Well, [151] I got odd jobs here and there.

Q. And then you were sent back again to prison?—A. Yes.

Q. Violated the parole again?—A. Yes.

Q. What did you do?—A. The balance.

Q. Beg pardon?—A. The balance of the time.

Q. You came out in 1944, I take it?—A. '45.

Q. '45?—A. 1945.

Q. And you were then about 20? Right?—A. Yes.

Q. What did you do from that time on?—A. Well, I had odd jobs, and I started to collecting numbers.

Q. Policy?—A. Policy.

Q. What else? Anything else?—A. No.

Q. Now, are you a user of narcotics?—A. Yes.

Q. When did you become a user of narcotics?—A. Well, I have been smoking marijuana—I started with marijuana.

Q. How long ago?—A. About when I was 20.

Q. And did you begin taking something else? Some other narcotics? Using some other narcotics?—A. Yes. I started taking cocaine.

Q. How long ago?—A. That's about three years ago.

Q. Did you use anything else?—A. I started heroin.

[153] Q. By the way, during the year 1949, were you laid up?—A. Yes, sir.

Q. For how many months?—A. About 8 months.

Q. What happened to you?—A. I couldn't walk.

Q. I mean what happened?—A. I went over an embankment in a car.

Q. You had an accident?—A. I had an accident.

Q. What happened to you?—A. I was paralyzed.

Q. What happened to you? Did anything happen to your back, or anything?—A. Yes, I had a broken neck and spinal injuries.

Q. What is paralyzed?—A. My left side, and I have no feeling on my right side.

Q. Your left side and part of your right side?—A. Yes, sir.

Q. After you were able to get out in 1949, up until the time you were arrested, what did you do?—A. Now?

Q. Did you find any work? Or were you doing illegal acts?—A. No. I would help my father-in-law.

Q. Were you doing anything else?—A. I was still collecting numbers, now and then.

Q. That's what I mean by "illegal acts." Now, did you ever sell heroin, cocaine, or any other narcotics?—A. No.

[153] Q. At no time, you say?—A. I never sold it.

Q. The last witness for the People said you are an international smuggler. Did you ever smuggle narcotics?—A. No, sir.

Q. Did you ever buy narcotics?—A. Yes, I bought it.

Q. On quite a number of occasions?—A. Yes, sir.

Q. And what did you do with the narcotics?—A. Used it.

Q. You have been a user, you say, now for how long?—A. I have been using it for about 5 years now.

Q. How do you take the narcotics?—A. Well, I sniff it, smoke it.

Q. You don't smoke heroin. Cocaine?—A. I sniff cocaine.

Q. Any other way of taking heroin?—A. I used to shoot it: speed balls.

Q. What does that mean?—A. That is mixing the heroin and the cocaine together, and shooting it.

Q. Into your vein?—A. Into my body.

Q. Did you in the past year do both? Sniff and inject?—A. Well, I took more to sniffing it.

By the COURT:

Q. Did you have any hypodermic needle at the time of your arrest?—A. No. I had given it up about three months [154] previous to that.

Q. You had given up the use of heroin?—A. No. I was still using it, but I was sniffing it after that.

Q. Three months before you gave up using it by injection?—A. Yes. I broke out in a whole lot of sores and boils and everything, and I took to sniffing the stuff.

By Mr. GELB:

Q. By the way, didn't your wife throw out the needle?

Mr. LAPPANO. I object to that.

Q. Did you have a needle in your house?—A. Yes.

Q. The hypodermic needle?—A. Yes.

Q. Did you have it?—A. Yes.

Q. Did you get rid of it, or what happened to it?—A. I got rid of it.

Q. Now, the Police came to your house. And O'Brien said that when he started to look through your bureau drawer he found a staple, that is, the stapling machine, envelopes and some capsules; and he began questioning you about each one. He says he found envelopes, and that you said to him "When I used to be in the racket I used them. I have no further use for them now." Did you tell him that?—A. No.

Q. He said when he found the capsules, you said the same thing: "I used to use them in the racket."—[155] A. No. We hadn't had——

Q. I beg your pardon?—A. We didn't have no lengthy conversation as he puts it.

Q. Tell us what happened when O'Brien came to your house with Schein.—A. Well, I had just gotten up, and like I usually do I took a cure——

Q. Speak up.—A. I had just gotten up, on account they were painting the house, and I couldn't sleep, and I couldn't do nothing. Before I had my breakfast I used to take a little cure.

Q. A what?—A. A little cure.

Q. What does that mean?—A. Well, I would sniff it. I would take a couple of passes, and then I would have something to eat. I am sitting in the kitchen, and I see the door go flying. These two men come running in, O'Brien and Schein. O'Brien stays in the hallway, and Schein runs into the front of the apartment. So they tell me—they asked my wife. "Where is George"? And I am in the kitchen. And I get up. They say, "Go to the front of the house." When I go to the front of the house, they say, "Where is the gun you shot the fellow with?" I said, "I didn't shoot nobody." They said, "Where's the numbers?" I said, "Well, that's different. Numbers? Yes." They said, "Where is the gun anyway?"——

Q. What about the numbers?—A. I told them that [156] I had numbers.

Q. Did he look for any?—A. No. Then Schein went to my room and started pulling out drawers and emptying them.

Q. What did he say he was looking for?—A. He didn't mention then. He just was looking.

Q. You say he asked you, "Where is the gun?"—A. Yes. I told him they were kidding him: I don't go around shooting nobody.

Q. What else took place?—A. When he started searching, I said, "Are you allowed to do that?" He said, "Well, we got a complaint." They started searching, and I didn't say nothing. They made me stand in the corner of the room——

Q. What room?—A. My room.

Q. Yes?—A. And he just went about rummaging up the place.

Q. Did there come a time he found envelopes?—A. No.

Q. What do you mean "no"?—A. He didn't find nothing.

Q. Didn't he find those envelopes?—A. Well, I believe O'Brien found them.

Q. I am saying, did any of them?—A. Yes.

Q. Either O'Brien or Schein, find the envelopes?—[157] A. Yes, sir.

Q. Did they find the stapling machine?—A. Yes, sir.

Q. When he found the envelopes and the stapling machine and capsules, did he say anything to you?—A. No.

Q. Either of them say anything to you?—A. No, they just kept looking.

Q. They just kept looking?—A. Yes.

Q. Where were these things, the envelopes and stapling machine?—A. They were laying around the bureau, on top of the bureau.

Q. I didn't hear you.—A. On top of the bureau that was painted.

The COURT. You mean on the shelf or on top of the bureau?

The WITNESS. No. The caps and everything was right on top of the bureau in plain view.

Q. But did they question you about those things? That is, before Fitzgerald came, did they question you about those things?—A. No.

Q. They didn't ask you anything?—A. No. They were just saying "Well, we can take him now. Let's take him in now.

That's enough." Everytime they found something they said "That's enough to lock him up for. That's enough to lock him up for."

Q. You knew, of course, you had heroin and cocaine in the house?—A. Yes.

[158] Q. And you knew where you put it?—A. Yes.

Q. Right?—A. Yes, sir.

Q. And you didn't want to tell the police that you had it there?—A. No.

Q. And you didn't?—A. No.

Q. Now, how long were they looking before somebody else came?—A. About 45 minutes.

Q. And have you given us the substance of the conversations they had with you?—A. No. Well, they found—first they found like an antique gun, and they said, "That's enough to lock him up for." And then——

Q. Was it a gun, or was it———A. No, just like an antique.

Q. It wasn't a gun in operating condition?—A. It wasn't nothing you could use. Something to hang on the wall.

Q. They said "That is enough to lock you up for"?—A. Yes.

Q. What else?—A. Then they found a brown piece of paper that I had just finished using stuff on. And they broke a little thing, some kind of thing, to drop it in and take a test of it,

Q. Did they say anything about it?—A. They said "What about this?" I said, "That's my kicks."

Q. "Kicks" what?—A. "Thats my enjoyment."

[159] Q. "Kicks"?—A. "Kicks". In other words, that is my enjoyment. I get enjoyment out of that, what they found.

Q. Have you given us the substance of the conversation before Fitzgerald and the other Agent arrived?—A. No, I haven't——

Q. Is that about the total amount of conversation?—A. That was the total conversation.

Q. Then did Fitzgerald and another Federal Agent arrive?—A. Yes.

Q. What did they do?—A. They went into the room, and they told me to sit in the parlor. And I was sitting in the parlor. The next minute I hear the fat fellow there say, "Here it is."

Q. That is Fitzgerald?—A. Yes.

Q. The man who last testified?—A. Yes.

Q. He said what?—A. "Here it is."

Q. Then what happened?—A. Then they called me and said "What is it?" I said it was heroin.

Q. And cocaine?—A. Yes.

Q. What else?—A. They said, "Who is your connection?" So I just shook my head. So they said, "Why don't you cooperate? We'll make it easy for you. And if not, we're going to make it tough. We'll see you get ten years flat", and threw a half dozen threats at me. [160] I said "Look, I can't help you." He said, "You are not being smart. Other people do it to you. Why can't you do it to them?" I just shook my head. He said, "In other words, you don't want to tell us nothing?" I said "You heard."

Q. Did he ask you whether you sell narcotics?—A. No.

Q. He didn't ask you that?—A. No.

Q. Did you tell him anything about narcotics—"Selling narcotics" being "my racket"?—A. No.

Q. Incidentally, Fitzgerald testified when he found this, you said to him, "That's what I use to cut drugs with." (Showing jug, People's Exhibit 10, to the witness.) Did he ask you anything about this? Fitzgerald, I mean.—A. No.

Q. Where did you buy narcotics?—A. (No answer.)

Q. I say, where did you buy narcotics?—A. I had a friend of mine that used to supply me.

Q. Did you buy it from one person or more?—A. One person. Except when he didn't come in, I used to go to the neighborhood and get it.

Q. A different person?—A. Yes. But I had one steady connection for myself.

Q. You say you never sold any drugs?—A. No.

Q. What did you use the envelopes for? Or what did you have them for?—A. Well, I would—so I can [161] make a compact package, and I could hide it on me and not be afraid of getting caught with it. I could make holes in my pants and stick it in.

Q. Why did you take it on your person?—A. I used to go to the park.

Q. You went out?—A. Yes, I went out. When I left the house.

Q. You mean you used it outside of the house.—A. Yes, sir.

Q. In other words, you say you used the envelopes to put narcotics in in order—for your own personal use, is that right?—A. Yes, sir.

Q. And what about the stapler?—A. The same thing. I used it to cut the envelopes——

Q. I don't hear you.—A. I used it to cut the envelopes in half, and then I would roll it up, measure it, so much that I think I could use for the day, then roll it up, and put a staple on it.

Q. What about the capsules? What was that for?—A. When I went to dances or something, in case of any time I would go to the neighborhood, there was always these policemen jumping out and lining up everybody, I would swallow it.

Q. By the way—you mean it is easier to swallow?—A. Yes, sir, it is easier to swallow.

[162] Q. You know it is a crime—you knew before you were arrested that it was a crime to possess what you did possess?—A. Yes.

Q. Didn't you?—A. Yes, sir.

Q. And you knew also, I take it, that it was a crime to possess narcotics when you are selling it? A. (No answer.)

Q. In other words, you knew it was a crime to possess narcotics for sale, for you to sell it?—A. I never sell it.

Q. But I say you knew it was a crime, didn't you?—A. I knew it was a crime.

Q. Did you know it was a more serious crime than just possessing?—A. (No answer.)

Q. In other words, possessing to sell?—A. Yes.

Q. Was a more serious crime than just to possess?—A. Yes.

Q. You knew that?—A. Yes.

Q. How did you happen to have a scale like that in your possession [indicating exhibit]?—A. That was a gift given to me. It comes with—like a little library set, for mailing—this party had come from across the country, or something; and it come like little books, where you put the stamps in for weighing

[163] letters, and for putting tags on packages. It all came in one set.

Q. That came with the set?—A. Yes.

Q. And it was given to you by whom?—A. By a lady.

Q. How long ago?—A. About six months.

Q. Before the arrest?—A. Yes.

Q. The supply that you had in your house, two ounces and seven-thirty-seconds of this mixture, heroin, plus the fraction of an ounce of cocaine, would last you how long? For use, I am talking about.—A. My use? About 50 days.

Mr. GELB. That's all.

Cross-examination by Mr. LAPPANO:

Q. Do you know a Joseph Strager and Emanuel Guevas?—A. No.

Q. Did you ever hear of those two names?—A. No.

Q. Well, in October of 1941, were you with two other men, and didn't you, with these two other men, commit a robbery?—A. Yes.

Q. Aren't those the two men, Joseph Strager and Emanuel Guevas?—A. Yes.

Q. What?—A. Yes.

Q. Now you know who I am talking about?—A. Yes, now I know.

[164] Q. That robbery occurred on October 18th, 1941, at 805 Park Avenue, a liquor store. Is that right?—A. Yes.

Q. And you at that time had a gun? Is that right?—A. No, sir.

Q. Didn't you and the others each have a gun?—A. No.

Q. You walked out of the store, and you were caught by the police? The three of you?—A. We didn't walk out of the store.

Q. You participated in that robbery, though?—A. I was there.

Q. How many of you had a gun?—A. Two of us.

Q. You and who?—A. Not me.

Q. The other two had guns?—A. Yes.

Q. Loaded guns?—A. I don't know if they were loaded.

Q. All right. You say you didn't have any gun. Is that right?—A. Yes.

Q. The other two did have guns?—A. Yes.

Q. You know as a fact that both of those guns were loaded, don't you?—A. No.

Q. You don't? And then you pleaded guilty to robbery in the second degree before Judge Schurman of this Court of General Sessions. Isn't that right?—A. Yes.

[165] Q. And on December 19th of 1941, Judge Schurman suspended sentence and placed you on probation, isn't that so?—A. Yes, sir.

Q. Approximately three months after December 19th, 1941, that is on March 24, 1942, you were arrested and thereafter convicted in connection with this burglary that you told us about, isn't that so?—A. Yes, sir.

Mr. GELB. He pleaded, didn't he?

Q. Well, you were convicted by a plea that you entered. Is that right?—A. Yes.

Q. And that was the occasion when you and a Morris Diaz burglarized an apartment, isn't that so?—A. Yes.

Q. And you were caught coming out of this apartment with the property that was stolen, isn't that right?—A. No.

Q. When were you caught?—A. About five blocks away.

Q. But you had the property in your possession at that time?—A. Yes.

Q. And when you pleaded guilty then, in 1942, it was before Judge Bohan, is that right?—A. Yes.

Q. And on May 19th, of 1942, Judge Bohan sent you to the Penitentiary for an indefinite term, is that right?—A. Yes, sir.

Q. That was in connection with this larceny arising [166] from the burglary you told us about, is that right?—A. Yes.

Q. And then Judge Schurman had you for a violation of the probation that he put you on in December of 1941, is that right?—A. Yes, sir.

Q. So he revoked the probation, and let you go to the Penitentiary to serve the time that Judge Bohan gave you?—A. Yes, sir.

Q. Is that right?—A. Yes, sir.

Q. You came out. Do you remember when you came out of the Penitentiary?—A. About May '45 when I finished.

Q. You were sentenced to the Penitentiary in 1942, May 19th, by Judge Bohan. Right?—A. Yes, sir.

Q. How long did you stay in until you were first let out?—A. I believe it was 15 months.

Q. Fifteen months. So that around August of 1943 you were out. Is that right?—A. I don't remember.

Q. You don't remember. Well, in December of 1943 you were returned to the Penitentiary, weren't you, for violating your parole?—A. Yes, sir.

Q. And that was in connection with this other matter that you have told us about. Right?—A. What other matter?

Q. You were arrested in some matter that constituted [167] a violation of parole, is that correct?—A. Yes.

Q. You told us that was what? What was that violation?—A. Grand Larceny.

Q. What had you done?—A. Grand Larceny.

Q. Of what?—A. Well, I was with six other——

Q. What had you stolen?—A. I hadn't stolen nothing. Six of us were in a car that was stolen.

Q. You weren't prosecuted for that larceny of the car?—A. No.

Q. You weren't convicted, I mean?—A. No.

Q. But that constituted your violation of parole?—A. Yes, sir.

Q. And you went back, and you served how much time?—A. Two months, I believe.

Q. Two months?—A. Two months.

Q. Now, did you go back again for violation of parole?—A. Yes.

Q. When was that?—A. A day later.

Q. What is that?—A. Two or three weeks later, I believe.

Q. For what?—A. They said the charge was robbery and assault.

Q. And they kept you then in the Penitentiary for the balance of the time that you owed, Is that right?—A. Yes, sir. [168] Q. And you came out finally when?—A. In May '45.

Q. May of '45?—A. Yes, sir.

Q. At that time were you married or single?—A. I was single.

Q. Where were you living then? May of '45? Where did you go to live?—A. With my brothers.

Q. With your———A. My brother.

Q. What are their names?—A. Bob. That is the oldest.

Q. Yes?—A. That's who I lived with.

Q. With Bob? Where?—A. Brooklyn.

Q. What address?—A. 133 Vernon Avenue.

Q. 133 Vernon Avenue?—A. Yes.

Q. What business is he in, if any?—A. He's a delegate in a package union, or something.

Q. He is a delegate of a union?—A. Yes, sir.

Q. And you lived with Bob?—A. Yes.

Q. In May of '45?—A. Yes, sir.

Q. And how long did you live with Bob in Brooklyn?—A. About six months.

Q. During those six months did you do any work of any kind?—A. Yes. I had done some jobs. I had been on a ship.

Q. Did you earn any money?—A. On a ship.

Q. How much?—A. I don't know.

[169] Q. You don't know how much you earned?—A. About $168.

Q. In six months?—A. No. Well, I had different jobs here and there.

Q. What different jobs did you do?—A. What different jobs?

Q. Yes?—A. Well, I worked for a bow—that you put on shoes—to put on shoes, on Lafayette Street.

Q. How long did you work there?—A. About a month.

Q. How much did you make?—A. I was making about $25 a week.

Q. $25 a week. You worked there a month. Then where did you work?—A. I had paid for a job to work in the Turf.

Q. Where?—A. Turf Resturant, on 49th Street.

Q. Doing what?—A. As a dishwasher.

Q. How long did you work there?—A. Well, they laid me off. They said I was too slow.

Q. How long did you work there?—A. About two weeks.

Q. Then where did you work?—A. I worked in the Park Central Hotel.

Q. Doing what?—A. The same thing, dishwashing.

Q. How long did you work there?—A. About a month.

Q. Then where did you work?—A. Then I got a job as a bouncer.

[170] Q. Where?—A. In a dancehall in the Bronx.

Q. What is the name of the place?—A. Grand Plaza.

Q. What is the address?—A. It's on—it's between Union and Westchester.

Q. How long did you work there?—A. I used to work there on Wednesdays, Fridays, Saturdays and Sundays.

Q. As a bouncer?—A. Yes.

Q. That means you kept order there? Is that right?—A. Yes.

Q. If anybody got rough, you grabbed hold of them and throw them out, is that right?—A. No, just tell them to leave, politely.

Q. If they didn't leave politely, you would bounce them out, isn't that so?—A. No. They had officers there for that.

Q. But you were the bouncer?—A. Yes.

Q. Pretty strong?—A. No, not strong.

Q. Tough?—A. No.

Q. Talk tough?—A. No.

Q. Get them out of there?—A. No.

Q. You weren't engaged because of any such qualities as that you had, were you?—A. No.

Q. How much did you get as a bouncer?—A. Oh, I get $15, for the night, or $10 for the night. It all depends on how the dance went.

[171] Q. How long did you say you worked there as a bouncer?—A. About a year.

Q. A couple of times a week, is that it?—A. Yes, sir.

Q. $15 each night?—A. Not each night. It went according to the business.

Q. And did you, during that year that you were a bouncer, have occasion to perform your duties as a bouncer?

Mr. GELB. Now, look——

Q. Grabbing people and throwing them out?

Mr. GELB. They wouldn't hire me as a bouncer. They are not hiring——

The COURT. Is that the objection?

Mr. GELB. Yes.

The COURT. Objection sustained.

Q. During the year, that was your sole source of income, is that right?—A. Well, partly.

Q. You were picking up numbers?—A. Yes, sir.

Q. And how much did you earn from that source?—A. $10 or $15.

Q. How much?—A. $10 or $15 a day.

Q. $10 or $15 a day?—A. Whenever I collected them.

Q. Well, did you during that year collect policy [172] numbers?—A. Well, I did not collect them every day.

Q. Well, how often did you?—A. Three or four times a week.

Q. And how much did you make per day?—A. I was getting 35¢ on the dollar.

Q. How much did you earn?—A. I never paid much attention to what I earned.

Q. What is that?—A. I never paid much attention to what I earned.

Q. Money didn't mean anything to you?—A. Well, I didn't have no sense of value. It meant that I could live; I could get a furnished room, or eat.

Q. Do you want us to understand then whatever you earned from policy collecting, as you say, you don't know how much it was? It didn't mean anything to you?—A. It meant my livelihood.

Q. But you can't tell His Honor and this jury now what you earned from policy collecting?—A. No.

Q. What?—A. Not to be definite.

Q. I don't want you to be definite. Can you tell us about how much you earned?—A. About $30, $35.

Q. A day?—A. A week.

Q. A week. Who did you collect for?—A. Big Red.

[173] Q. Big Red?—A. Yes.

Q. Where did he operate?—A. In the Bronx.

Q. Where?—A. Along Prospect Avenue.

Q. Did he have a place?—A. Well, they used to work out of a candy store up there. There was like a bunch of them. I used to collect them and turn them in to him.

Q. Where did you collect the numbers?—A. Bars, and in the dance hall.

Q. Where?—A. In the dance hall and bars.

Q. Location? Streets? Neighborhoods?—A. Around there.

Q. Around where?—A. Westchester; Longwood.

Q. In the Bronx?—A. In the Bronx.

Q. And you lived then where?—A. Where was I living at that time?

Q. Yes.—A. On 75th Street.

Q. What address?—A. 175 West 75th Street.

Q. Is that a furnished room?—A. Furnished room.

Q. Did you have anybody living with you there?—A. No.

Q. Alone?—A. Yes.

Q. This was 1945 to 1946, or where was it? '47, or '48. I don't know. When? That you told us about? This year at the———A. When are you talking [174] about?

Q. I am asking you to tell us, if you can, this year that you were acting as a bouncer and at the same time collecting policy numbers. When was that?—A. That was '46-'47.

Q. '46 to '47?—A. Yes.

Q. And when you left this job as a bouncer, what did you do?—A. Still taking numbers, and running games.

Q. And running games. And by that you mean gambling?—A. No. I would start a dice game, and then I would cut it.

Q. You would cut the games. And when you ran these games, was it at your place that you conducted?—A. In the alley, or in furnished rooms,—apartments.

Q. You would go around gathering men to come to this place where you ran the games, is that it?—A. Yes, sir.

Q. And how much did you earn from that source?—A. Well, it varied.

Q. I know it varied. Can you tell us how much you earned? How much did you make?—A. It all depended on the game.

Q. I know that too. Can you tell us over a period of time, say in a month, how much did you earn?—A. You [175] don't run a gambling game every day.

Q. I don't ever run one. How often did you hold these games?—A. On a Friday, Saturdays and Sundays.

Q. How much did you make?—A. And I would make 50, 60.

Q. And how long did you do that?—A. I still do it. I still would do it.

Q. You mean from that time until the time you were arrested you were still doing it? Is that what you want us to understand?—A. Until what time? This arrest?

Q. From the time that you said you started to run games.—A. Yes. Well, I was told by officers in the Bronx that I should leave the Bronx. So I had to give up working in the dancehall.

Q. So you came to Manhattan?—A. Yes.

Q. Where did you go and live then?—A. I was living on 75th Street.

Q. And you started operating in Manhattan with games too, is that it?—A. Yes.

Q. Where did you operate in Manhattan?—A. Around Harlem.

Q. I beg pardon?—A. Around Harlem.

Q. When you say "Harlem" can you tell us specifically [176] what part of Harlem?—A. 105th Street. Wherever the games were. 105th Street, 108th Street and 111th.

Q. East side or West side?—A. East side and west side.

Q. Both?—A. Where I could make a dollar.

Q. Wherever you could organize a game and cut?—A. Or even get into a game, yes.

Q. And you did that all throughout this period, up to the time you were arrested. Is that what you want us to understand?—A. No. I was in bed—I had the accident. I have been in bed for about 8 months.

Q. Now, before the accident—when was the accident, by the way?—A. December '48.

Q. December of 1948?—A. Yes.

Q. Before that accident, you were shot, weren't you?—A. Yes.

Q. When was that?—A. I believe it was in July '48.

Q. July of 1948. Is that right?—A. I believe so.

Q. Who shot you?—A. I don't know.

Q. Were you questioned at that time by the police?—A. Yes.

Q. Did you tell the police at that time how you [177] came to be shot?—A. Yes.

Q. How?—A. Well, I seen a fight in the street, and I ran over. At the next minute, I was shot.

Q. You seen a fight?—A. I seen a whole bunch of people fighting in the street. I went over there to see—just—just to see, and the next minute I turned around, I felt I was shot.

Q. Were you, at the time you were shot, engaged in some argument or discussion with another man about territory in which the—or, question withdrawn. Engaged in a discussion with a man in connection with dope?—A. No.

Q. Specifically, concerning the sale of drugs of an inferior grade than what was supposed to have been given?—A. No.

Q. Nothing like that?—A. No, sir.

Q. There were three persons, at the time when you got shot, present; you and two others. Isn't that so?—A. I don't know.

Q. You don't know? You were there, weren't you?—A. I was there.

Q. Wasn't there three of you altogether?—A. I don't know. I got shot, right away. I wasn't there a second when I got hit with a bullet.

[178] Q. Where was this you got shot?—A. On Fifth Avenue.

Q. What street?—A. Between 111th Street and 112th St.

Q. What time of the day?—A. It wasn't the day. It was at night. It was after the dance. I had come from the dance on 110th Street. It was on a Sunday night.

Q. Weren't you at that time talking with somebody?—A. Was I with somebody? I was with a girl.

Q. With a girl?—A. Yes.

Q. Was there a man involved there?—A. No.

Q. So you just got shot by somebody you didn't even know, is that it? Never had seen that person before?—A. No.

Q. Well, you weren't married then?—A. No.

Q. That was in 1948 we are talking about. Is that right?—A. (No answer.)

Q. July, you say it was, 1948?—A. I believe I don't quite recall.

Mr. GELB. Talk up.

The WITNESS. I don't believe——

Q. You don't believe what?—A. I don't quite recall.

Q. You recall the time of your accident, don't you?—A. December '48.

Q. Didn't you just tell us a moment ago that this shooting———A. In July, I believe, of '48.

Q. Was in July of 1948?—A. Right.

Q. You weren't married then?—A. No, but I was—[179] well, I was courting my prospective intended-to-be bride.

Q. Is this the woman that was with you?—A. No.

Q. In other words, you were courting the woman that you later married, but you just happened to be———A. Yes, duriny that year; but I happened to be out with——

Q. With another girl?—A. Yes.

Q. All right. So when you got into this accident in December, you were living on 75th Street?—A. Yes.

Q. Is that right?—A. Yes, sir.

Q. This was an automobile accident?—A. When I had the accident?

Q. Yes?—A. No.

Q. You were in an automobile, weren't you?—A. Yes.

Q. You were driving a car?—A. Yes.

Q. Your car?—A. Not my car.

Q. Somebody else's car?—A. Yes.

Q. Have you ever owned a car yourself?—A. No.

Q. And then you came out of the hospital when?—A. In February. I asked to be dismissed because I wanted to be out for my birthday.

Q. You went in in December?—A. Yes.

Q. Of 1948?—A. Yes.

Q. And you came out in February of 1949?—A. Yes.

[180] Q. Is that right?—A. Yes.

Q. So that you were only in the hospital about two months?—A. Yes.

Q. Is that correct?—A. Yes.

Q. When you came out you had crutches, did you? Did you need crutches?—A. I was wearing braces, and my brother carried me out of the hospital.

Q. Did you use crutches?—A. No. I was using some kind of a wagon.

Q. Where did you go to live? Back to 75th Street, when you came out of the hospital?—A. No. To my fiance's house.

Q. You still were not married?—A. No.

Q. Then you weren't able to do any work at all?—A. No.

Q. Is that right?—A. Yes.

Q. You weren't able to run any more crap games, is that right?—A. That's right.

Q. So that from February of 1949 until the time you were arrested you weren't able to do any kind of work. Is that right?—A. That's right.

Q. And you didn't do any kind of work?

Mr. GELB. "Work" in its literal sense, are you talking about?

Q. I mean gainfully employed so that you were [181] earning money. You weren't able to do any of that?—A. No, I could not.

Q. You got married?—A. Yes.

Q. When did you get married?—A. A month after I got out of the hospital.

Q. In March?—A. Yes.

Q. Of 1949?—A. Yes.

Q. At that time you had a child by some other woman, isn't that right?—A. No. By the woman I married.

Q. Other than the woman that you married, didn't you have a child?—A. No.

Mr. GELB. I object to this.

Mr. LAPPANO. All right.

Mr. GELB. Is this impeaching testimony?

Mr. LAPPANO. Yes.

Mr. GELB. I wonder if it is.

The COURT. Go on.

Mr. GELB. I object to it.

Q. How many children do you have?—A. I have two, and one I adopted.

Q. Well, is this child that you adopted your own child, or the result of a relation with some other woman?—A. No. It is the same woman.

Mr. GELB. I object to it.

[182] The COURT. Objection sustained.

Mr. LAPPANO. All right.

The WITNESS. The same woman.

The COURT. All right.

Q. Now, come to this day of December 21st. You say that you had just gotten up when the police came into your apartment, is that right?—A. Yes.

Q. That was around what time?—A. Around 11:00.

Q. What time?—A. Around 11:00.

Q. Wasn't it after 12:00?—A. No.

Q. Didn't you have painters in the apartment?—A. We were expecting the painters at 10:00, and they didn't come at 10:00. They came crashing in about 11:00.

Q. And how long would you say they were in your apartment altogether, from the time they came until the time they left?—A. Until about 1:00.

Q. Two hours?—A. Well, they had come, and then they called for two more.

Q. Well, you heard Detective O'Brien testify that it was after 12:00 o'clock when he came there?—A. Yes.

Q. You wouldn't say that is not true, would you?—A. That is not true.

Q. What?—A. It is not true.

Q. It is not true. You heard Detective Fitzgerald [183] testify that he came there with this other Federal Agent around a quarter after one?—A. Yes.

Q. Is that right?—A. Yes.

Q. Is that about the right time?—A. Yes, sir.

Q. But at that time you were in your bathrobe, is that right?—A. Pajamas.

Q. Pajamas. And you were seated in the kitchen, is that correct?—A. Yes, sir.

Q. Is that correct? You were in your pajamas, and you were in the kitchen of your apartment———A. Yes.

Q. When the detectives Schein and O'Brien, came in?—A. Yes.

Q. Now you know both of these detectives, don't you?—A. No.

Q. You know O'Brien, don't you?—A. No.

Q. You never saw him before?—A. No.

Q. Is that the first time you ever saw him?—A. (No answer.)

Q. Is that right? The first time you ever saw him in your life?—A. The first time I ever saw him.

Q. You never spoke to him anywhere?—A. Never.

Q. Well, when O'Brien and Schein came in, they addressed you as what? "George" or "Angelet"? What did they say?—A. "George."

Q. He knew your first name. What did you say? [184] "How are you"? Did you?—A. No. I come out. He said "Hello, George." I said, "Hello". I said, "What's this?" He said, "Where's the gun you shot the fellow with?" I said, "I don't go around shooting nobody."——

Q. Just a minute. Did either Detective Schein or Detective O'Brien say to you, "We come up here to make a search"——A. No.

Q. "For a gun and for dope,"?—A. No.

Q. Nothing like that?—A. No.

Q. Well, after they were there, didn't they tell you they were going to make a search for dope?—A. No.

Q. They never said that to you?—A. No.

Q. Did they ask you whether you had any dope?—A. They asked me "Where is the p[illegible]y, and where is the gun?"

Q. Never said a word to you about dope?—A. No. Then they picked up a 'phone——

Q. I am asking you, never said a word to you about dope, looking for dope? That is what they were there for?—A. No.

Q. Are you sure about that?—A. Positive.

Q. Did you tell Detective Schein and Detective O'Brien that you were through with the racket, that you [185] gave it up, or that "too many stool pigeons", and there is too much police activity, that you gave it up? Did you tell them that, or in substance that?—A. No, sir.

Q. Never said that at all?—A. No, sir.

Q. In any event, Detective Schein and O'Brien began to search the apartment, is that right?—A. Yes, sir.

Q. At that time your wife was in the apartment——A. Yes.

Q. An elderly lady——A. Yes.

Q. And some child?—A. My children, yes.

Q. All right. And isn't it a fact that you and Detective Schein and O'Brien went into your bedroom, which is in the front part of the apartment? Is that right?—A. Well, he was already in my bedroom when they told me to come out of the kitchen.

Q. Well, they were in the kitchen first, talking with you, weren't they?—A. No. One was in the hallway, and he told me "Come on out of there." And Schein was already in my bedroom.

Q. When you say "Hallway", you mean the little foyer in the apartment?—A. Yes.

Q. Not in the public hallway?—A. No. In the foyer.

Q. You mean the little hall in the apartment?—A. [186] The little hall there.

Mr. LAPPANO. Your Honor, shall we recess? I'll be quite a while with this witness, I'm afraid.

The COURT. How long?

Mr. LAPPANO. I think we'll be maybe the best part of the afternoon.

The COURT. Members of the jury: You are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is finally submitted to you. Be on hand at 2:15.

(Trial resumed after noon recess.)

George Angelet continued.

Cross-examination (continued) by Mr. LAPPANO:

Q. Before we recessed, I think we had come to the point where I had asked you about going into the bedroom where you say Detective Schein and O'Brien were. Is that right?—A. Where Detective Schein was.

Q. You went into the bedroom, didn't you?—A. Yes, sir.

Q. They called you in, you say?—A. Yes.

Q. And Detectives Schein and O'Brien were searching in that room. Is that correct?—A. Detective Schein was.

[187] Q. Now, you have—or you had in that room, a sort of a closet that had one side in which you hang clothes and the other side a set of drawers. Is that right?—A. No.

Q. You had no such closet in there at all?—A. I had a closet, yes; but not with drawers in it.

Q. Well, did you see him go through this closet?—A. Yes.

Q. And they found there—the first thing was—these cellophane envelopes and the stapling machine and stuff, is that right?—A. They didn't find nothing in the closet.

Q. Well, they did find cellophane envelopes, didn't they?—A. Not in the closet.

Q. Where did they find it?—A. In one of the bureau drawers.

Q. A drawer of a bureau?—A. Yes.

Q. I show you these empty envelopes, 54 of them. These are the envelopes, aren't they? Look at them. [Handing to the witness.]—A. Yes.

Q. What is it?—A. Yes.

Q. Now, when these envelopes were found, they were shown to you, weren't they? The Detective showed them to you?—A. Yes.

Q. And he asked you about them? Didn't he?—A. No.

[188] Q. Didn't he ask you "What are you doing with these"?—A. He said, "What about these?"

Q. And what did you say?—A. I didn't answer.

Q. You didn't say a word?—A. I didn't say nothing.

Q. In fact, didn't you say at that time that———A. I hadn't——

Q. Just a minute. Didn't you say at that time that you had these from before?———A. I had not said that.

Q. When you were—let me finish my question, please—when you were in the racket, but that you weren't in it any more? Didn't you say that?—A. No, sir.

Q. Well, what did you say about them?

The Court. He said he said nothing.

A. I did not answer.

Q. You did not answer?—A. I did not answer. I just looked at him.

Q. Just looked at him. Now, what did you have them for? What did you have these envelopes for?—A. Well, I used to make compact packages for myself.

Q. Packages of what?—A. If you give me one, I will show you what I used to do with them.

Q. What did you put in them?—A. I used to put about one-sixteenth of heroin into it.

Q. One-sixteenth of what?—A. Of heroin.

Q. One-sixteenth of what? Of a grain?—A. Heroin.

Q. Or a gram? Or an ounce?—A. One-sixteenth of heroin.

[189] Q. When you say "one-sixteenth", what quantity is that?—A. That is a teaspoon.

Q. You put it in here [indicating envelope]?—A. That's right.

Q. Why would you do that? Why would you put it in here [indicating envelope], if you are going to use it yourself?—A. Well, I wasn't going to take a teaspoon and stick it into my pocket. I had to put it into something.

Q. So you would use this [indicating envelope]?—A. I would cut that down.

Q. You would cut it down to half, is that it?—A. Yes. Give it to me and I will show you.

Q. [Handing envelope to witness]—A. [illustrating] I would do this. I would take the scissor, and cut them down to about this, so it wouldn't be bulky. [Folding and tearing the envelope.]

Mr. GELB. You are tearing the evidence.

Mr. LAPPANO. Tearing the evidence.

Let the record show that one of the envelopes has been torn by the witness.

Q. All right.—A. I would fix it like this [illustrating], put a staple there [indicating], and a staple there [illustrating], and then I would either put it here [indicating], or put it up in here [indicating], where it would be easier for me to hide.

[190] Q. When did you get these envelopes?—A. Not long. I don't know.

Q. When did you get them?—A. Maybe a day or two—that same week.

Q. How many did you get?—A. I don't know. I don't count them.

Q. Hundreds of them? Thousands of them?—A. No, no. Just what you got there, except for the two that I used when I packaged up them.

Q. In other words, this is all that you ever had, except two?—A. That's all.

Q. Is that right?—A. Yes.

Q. Now isn't it a fact that the reason you had this type of envelope is so that when you put the white powder in there, that you could see through it, that it had powder?—A. No; not necessarily.

Q. Not necessarily?—A. No. Why should I want to see what is in it? I know what's there.

Q. So that you could use any kind of an envelope, couldn't you? You didn't have to use this particular kind of an envelope, is that right?—A. Not necessarily.

Q. You could use any type of envelope, isn't that so?—A. I wouldn't say.

Q. Isn't it a fact that this is the type of envelope?—A. You could put anything in anything.

[191] Q. Isn't it a fact that this is the type of envelope that you used——

Mr. GELB. What is his answer?

The WITNESS. That I could put anything into any kind of an envelope.

Q. You what?—A. That is what you said. If I could put it into any kind of an envelope. What you can put into there, you can put into anything. You can put into anything, I guess.

Q. Where did you get these envelopes?—A. You can get them in the stationery store.

Q. Where did you get them?—A. I had somebody get them for me.

Q. And you specified this particular type of envelope?—A. I did not specify nothing.

Q. Now I ask you, isn't it a fact that the reason you used this type of envelope, that you can see through, that there is white powder in there?—A. I told you no. It doesn't have to be that.

Q. You say "no". So that if you give it to somebody, to sell, at least they know they are getting something in the envelope and not getting some sand, or something other than a white powder?—A. I never gave nothing to anybody to sell.

Q. I didn't ask you that.—A. Well, you are saying it: if I gave it to somebody to sell. I never gave nothing [192] to anybody to sell.

Q. Now I show you these capsules, Exhibit No. 2 [handing to witness]. You recognize those, don't you?—A. I do.

Q. Where were they?—A. They was in a little, like we had—a champagne glass.

Q. How much does one of these capsules hold?—A. I never measured it. I wouldn't know.

Q. You know there are different sizes capsules?—A. Well, that is understood.

Q. What size is this?—A. I don't know. No. 5, No. 4.

Q. No. 5 or No. 4. Well, how much does No. 5 or No. 4 hold?—A. I don't know.

Q. How much drug?—A. I don't know. I never measured it.

Q. Is this a grain in here?—A. I don't know.

Q. If you fill this up, isn't it a grain?—A. I don't know nothing about grains.

Q. You don't, ha?———A. (No answer.)

Q. What did you have these for?—A. Well, when I went to the neighborhood, I used to put it in that because they were always jumping in the neighborhood and raiding, and if something happened it would be easier for me to swallow.

[193] Q. Don't you know that this is the type of capsules that is used by sellers of drugs? Don't you know that?—A. Well, I bought it.

Q. It is a fact, isn't it? You buy it in this type of capsules from sellers?—A. Well, if you buy cocaine.

Q. Is that right?—A. Yes.

Q. And when you buy one of this size, you know you are buying about a grain or a grain and a half, isn't that so?—A. I don't know.

Q. You know you are not buying ten grains, don't you?—A. Well, just like I don't know if I am buying the grain. I don't buy it to weigh how much it is. I buy it to use it.

Q. When these capsules were found by the detectives, they asked you "What are you doing with these?" Isn't that so?—A. (Witness makes unintelligible sound.)

Q. What did you say?—A. The same thing. I didn't answer.

Q. You didn't answer at all?—A. I wouldn't answer, no.

Q. You wouldn't answer?—A. Not that I wouldn't. I just looked at them and didn't say anything.

Q. Didn't you tell the detectives at that time that——A. No.

[194] Q. That these were—you don't know the question I am going to ask, and you are saying "no."—A. I know what you are going to say.

Q. Did you tell the detectives at that time, with respect to these capsules, that you had them from before when you were in the racket?—A. Never.

Q. Never said that?—A. No.

Q. Now, this stapling machine, People's Exhibit 3 in Evidence [indicating]. That was found there too, wasn't it, by the detectives?—A. Yes.

Q. And you were questioned concerning your possession of this, weren't you?—A. I wasn't even——

Q. Right?—A. No.

Q. Didn't they show it to you?—A. They showed it to me, just like they showed me the other things.

Q. And they asked you "What are you doing with this?"—A. They said "This is enough" to lock me up for.

Q. Did they ask you "What are you doing with this?"—A. No.

Q. Didn't you tell the police officer that you used this to staple the envelopes?—A. Well, I know that I use it, but I did not tell them that.

Q. Did you tell them that?—A. No.

Q. Did you tell them you had it, that you had used it from before when you were in the racket?—A. Never.

[195] Q. You never said that?—A. No.

Q. And the staples, People's Exhibit 4 [showing]. They were found there in your room. Right?—A. Yes.

Q. In this drawer. They showed them to you, didn't they?—A. No. I could see them. They didn't have to show them to me.

Q. They questioned you about those, didn't they?—A. No.

Q. Didn't say a word to you about that? Did they ask you "What are you doing with these?" or "What do you use them for?"—A. No.

Q. Didn't you tell them you had it from before when you were in the racket?—A. No.

Q. Nothing like that?—A. No, sir.

Q. Now, this scale, People's Exhibit 5 in Evidence [showing exhibit]. They found that in the drawer. Right?—A. No, they didn't find that in no drawer.

Q. Where did they find it?—They found it in the cabinet that it was.

Q. They found it in a cabinet?—A. A little library cabinet that I explained before.

Q. When this was found———A. They found that.

Q. Did they ask you about that?—A. No. They had found that previously, and they hadn't made no mention of it until they found that stuff, they put that with that.

[196] Q. Whenever it was, did they ask you about this scale, what you had it for? Did they ask you about it?—A. No. I don't remember.

Q. Never asked you a word about it?—A. (No answer.)

Q. You say that you used this too for what purpose?

Mr. GELB. He didn't say that. Excuse me.

Q. What do you use it for?—A. I didn't have any use for it. It was just a gift, like I said, in a cabinet, for postage, for somebody to send postage to another country.

Q. Did you ever use this scale?—A. No.

Q. Never used it at all. Are you sure about that?—A. I didn't have no use for it.

Q. What?—A. I didn't need to use it.

Q. What did you have it for? For what purpose did you have it?—A. Well, it was there, and it was laying there.

Q. Didn't you tell the police officers that you used it to measure and weigh the drug?—A. No.

Q. Never said that at all?—A. No.

Q. Before? That is, before that; you now were not in the racket, but that is what you had it before?—A. I was never in no rackets.

Q. You didn't say that to them?—A. No, I never was in the rackets.

Q. You say you really never used this scale? You [197] just had it there, but never used it. Is that it?—A. (No answer.)

Q. Now, look at this scale. Will you look at it? [Handing scale to the witness.]—A. Yes.

Q. How much does that measure?—A. Two ounces.

Q. Two ounces. Didn't you use this scale to measure the drug that was in the packages that were found on that closet?—A. No.

Q. Never used it for that purpose? Well, how did you measure out this drug? With what?—A. Used teaspoons. I did not have to use a scale. A teaspoon.

Q. Now, referring to this package of white powder, the heroin, package No. 1, Exhibit No. 6 [handing]. When that was found, you were asked about that, weren't you?—A. Yes, I was.

Q. You recognized it, didn't you?—A. Yes.

Q. You knew it was drugs?—A. Yes.

Q. You told them it was heroin. Right?—A. Yes.

Q. They asked you how much was in there. Right?—A. No; no.

Q. They did not ask you that?—A. No.

Q. Didn't you tell them there was an ounce in there?—A. No.

Q. You didn't tell them that?—A. No.

Q. Well, you have heard testimony of the chemist here now that there is an ounce in here?—A. Yes, but [198] they said just that I should hope that there isn't no more than two ounces there.

Q. You heard that there is an ounce in here. Right?—A. Yes, that is what I heard.

Q. And didn't you just put one ounce in here?—A. Yes, I put it in.

Q. And in putting that, exactly one ounce, in here, didn't you use a scale?—A. No.

Q. You notice the little ring up at the top [showing scale and indicating]. See that little ring?—A. This [indicating]?

Q. Yes. The one I am holding in my hand now, of the scale in evidence.—A. Yes, I see it.

Q. Do you notice that there is a bit of what appears to be scotch tape on top of there? Do you see what? [Indicating.]—A. Yes.

Q. You put that on there, didn't you?—A. No.

Q. You didn't?—A. No.

Q. Was that on there when you got it from your girl friend six months before?—A. Yes.

Q. Just like that?—A. Yes.

Q. You are sure about that?—A. Well, I never used it.

Q. Didn't you use a bit of adhesive tape on there to be able to stick it on to something so that it would hang without your holding it in your finger when you were weighing things with it?—A. No.

[199] Q. You don't know how that got on there, do you?—A. No.

Q. Now, when this drug was found, the packages—you have seen them in evidence now, including the cocaine,———A. Yes.

Q. Each package was shown to you by the detective, isn't that so?—A. No. It was laying on the bed, and I was asked what was it. I told him it was heroin. "Who did it belong to?" "It belonged to me."

Q. And you told them that you had that stuff from before when you were in the racket. Isn't that what you told them?—A. No.

Q. What did you tell them?—A. I told them it was mine, that's all. Then he says, "Well, who was the connection?" and I shook my head.

Q. By shaking your head you meant you would not tell what the connection was, is that right?—A. That's right.

Q. Now, you were asked by the police specifically how long you had been in this racket, weren't you?—A. No.

Q. Did you tell the Police that you had been in it for two, or three, or four, or five years?—A. No.

Q. You didn't tell them at all?—A. No, sir.

Q. And that you were having a good run, a good long [200] run? Did you tell them that?—A. No.

Q. And that you were not going to tell on anybody? Nobody has told on you?—Nothing like that?—A. No, sir.

Q. You remember when this jug, People's Exhibit 10 in Evidence, was found? Do you remember that?—A. Yes, sir.

Q. That was the Federal Agent that found that. Right?—A. Yes. He says——

Q. Then you were questioned about this jug and what is in it?—A. I was not questioned. They said "Well, here is the milk sugar." One of them said, "Well, here is the milk sugar."

Q. You know that that is milk sugar?—A. I have been told that. I have heard it a dozen times.

Q. Well, isn't this yours?—A. Yes, that's mine.

Q. This was found before the drugs were found, isn't that so?—A. I don't know. I don't remember.

Q. You don't remember that?—A. No.

Q. Don't you know that was the first thing that the Agent found—the Federal Agent found?—A. The first thing the Federal Agent found, if I remember, was the stuff. And then I heard one of them say "There's the milk sugar."

Q. You put it———A. And I wasn't asked what it was, but they said——

[201] Q. Whenever it was that it was found, were you asked "What is this?"—A. No.

Q. Didn't you tell them that that is used to make up the mixture of heroin?—A. No, sir.

Q. You didn't say that at all?—A. No, sir.

Q. Now, that is what you used it for, isn't it?—A. That is what I used it for, yes.

Q. Now, when had you used this jug and the powder, the milk sugar, that was in there? When had you used it before the officers came in that day?—A. On the 20th.

Q. You had used it on the 20th?—A. Yes.

Q. And you had made———A. What you got there now.

Q. What?—A. What you got there.

Q. In other words, you had used this milk sugar to make packages one, two and three of heroin?—A. Yes.

Q. And also the cocaine capsules?—A. No.

Q. So you had used it only in connection with mixing the heroin, is that right?—A. Yes.

Q. That was the day before?—A. Yes.

Q. Is that what you say?—A. Yes.

Q. What quantity of heroin did you have the day before, when you were using this milk sugar?—A. Well, I was given a pure half.

Q. You were getting pure half. By that you mean that [202] the heroin you got was fifty percent pure? Is that it?—A. No. I don't know the percentage.

Q. Didn't you just say fifty percent?—A. I didn't say nothing.

Q. "Pure half", you said.—A. "Pure" who? It was pure.

Q. Didn't you say "pure half"?—A. Pure half ounce.

Q. A pure half ounce?—A. Yes.

Q. In other words, you had gotten a half ounce of pure heroin, and you used this sugar, powder sugar, to cut it down?—A. Yes.

Q. Is that right?—A. Yes.

Q. So that instead of having one hundred percent, or as near one hundred percent pure heroin as you could, you cut it down to thirty percent, and eighteen per cent. Is that right?—A. I don't know the percentage. I cut it to—as I used it, I cut it to the strength that it is good for me.

Q. Well, you could use that pure heroin, couldn't you, without adulterating it? Is that right?—A. I could.

Q. Is that right?—A. I could, but I wouldn't.

Q. Well, isn't it better—A. No.

Q. Hasn't it got a better, a faster action?—A. The [203] kick is quicker, but it's more dangerous.

Q. So you cut it down to thirty per cent?—A. Yes.

Q. How were you able to arrive at that particular quantity, thirty per cent of one ounce? How were you able to measure it that way?—A. I measured it for eight spoons only, and I just added twenty-four spoons to it.

Q. Eight to twenty-four. Is that it?—A. Yes.

Q. You didn't use the scale at all?—A. No.

Q. You know you cut——

Mr. GELB. Eight to what?

Mr. LAPPANO. Eight to twenty-four.

Mr. GELB. Eight what?

Mr. LAPPANO. Eight spoons, he said.

Mr. GELB. To what?

Mr. LAPPANO. To twenty-four spoons.

Q. In other words, you want us to understand you used eight spoons of the so-called pure heroin, and added to that twenty-four spoons of the milk sugar. Is that right?—A. Yes.

Q. When it came to making up the third package, how did you measure that?—A. I had just a little left over, and I put it into the third package.

Q. Like that, ha? You know, don't you, that an ounce of drug, heroin, has how many grains in it?—A. I [204] don't know.

Q. Never heard of that, did you?—A. No.

Q. Never heard that there are four hundred and thirty-seven grains in an ounce?—A. No.

Q. Never heard of that? But you know that you can cut that down to suit your own convenience, is that right? That one hundred per cent pure heroin that you told us about? You cut it down to anything you want?—A. I don't know if any heroin is one hundred per cent.

Q. Well, as near one hundred per cent as it could be. You could cut that down to anything you want. Is that right?—A. I don't know.

Q. You don't know that? You say you bought heroin before this day, for personal use, in caps. Is that right?—A. Yes, sir.

Q. When had you last bought heroin for your own use before December 21st?—A. I have been buying it previously to that.

Q. When had you previous to December 21st purchased heroin in caps for your personal use?—A. 17th.

Q. The 17th?—A. The 16th, 15th, 14th, 13th.

Q. How many did you purchase on the 17th?—A. I used to pay $5 for 25. I was given 25 caps for $5.

Q. And how strong were those?—A. Well, I used to have to wind up maybe using the whole 25 to get any kick.

[205] Q. Very weak stuff, is that right?—A. That's right.

Q. Those were one———A. I don't know the percentage. I just know it by the feeling it gives me.

Q. These caps you say you bought, were they one grain or one and a half grains?—A. They were smaller caps.

Q. The same size you have here?—A. No. Smaller.

Q. Even smaller than those?—A. Yes.

Q. And you know that those caps that you bought then were very weak, is that right?—A. Yes.

Q. On the 17th, when you bought these 25 caps that you told us about. Is that what you say? 25 caps?—A. Yes.

Q. You paid $5 for them?—A. Yes.

Q. You used them all in the one day?—A. No. I would use maybe 12, maybe 13.

Q. Just one or two days supply, that was?—A. That's all.

Q. How about on the 16th? How many did you buy then?—A. I bought a half a pack.

Q. A half a pack, meaning how much?—A. 12.

Q. How much?—A. 12.

Q. Twelve caps?—A. Yes.

Q. What did you pay for those?—A. $3.

[206] Q. And similarly in previous days, is that it?—A. Yes.

Q. How long have you been using heroin?—A. I started using it after the accident.

Q. Your accident was in December of 1948, is that right?—A. Yes.

Q. And you say you have used heroin ever since?—A. Yes.

Q. Every day?—A. Not every day.

Q. Well, how often?—A. Say, every—sometimes every day; sometimes I could go a day without it.

Q. But most of the times you had to have it every day?—A. Most of the times I had to have something.

Q. What?—A. Most of the times I had to have it.

Q. And you did have it almost every day?—A. Yes.

Q. What effect did it have on you when you took heroin?—A. That was the only thing I could use.

Q. What effect did it have on you?—A. Well, it gave me peace; it made me sleep; it made me eat; it made me feel like I could be.

Q. When you were out of it, then what?—A. Out of it, I was nervous, and pains, and everything else.

Q. And you had to have it again?—A. I had to have it.

Q. In other words, you became an addict to it, is [207] that it?—A. Well, I had to have something.

Q. I say after a little while——A. I could not help myself. I had to have it.

Q. Then you have to have it. Is that right?—A. I had to have it.

Q. So that you then became an addict, is that correct?—A. Yes.

Q. And I understood you to say that you then take cocaine also, is that right?—A. I took that before the accident.

Q. You took that before the accident. But after the accident you told us something about combining cocaine with heroin, is that right?—A. Speed balls.

Q. You did that?—A. Yes.

Q. Why?—A. It was a better kick.

Q. A better kick?—A. It hit you quicker.

Q. In other words, it helped to give you quicker action, is that right?—A. Yes.

Q. And yet here you had pure heroin, and you say you were diluting it?—A. Yes.

Q. Eight spoons to twenty-four? Is that right?—A. Yes.

Q. As a matter of fact, you diluted that in order that you would be able to make more, so that you could sell a greater number?—A. I never sold anything. I did [208] it because the man that suppplied me told me he wouldn't be back for two months, and I had to try to make it last.

Q. Yes, but you just told his Honor and this jury that you found it necessary to get stronger action, and you had to add cocaine, is that right?—A. No. It wasn't stronger. Just the kick was quicker.

Q. And you knew you could get a quicker kick with pure heroin than you could with heroin that is diluted down to thirty per cent, don't you?—A. No.

Q. You don't know that?—A. No.

Q. Now, before these scales and the staples and all this other stuff was found, some money was found in some place there, is that right?—A. There was no money.

Q. It was in a drawer or something?—A. No. My wife had a few dollars in her blouse——

Q. I am talking about the testimony of the police officer about the $700 that was found some place. Do you remember that?—A. There was no $700 in the house.

Q. Wasn't there a large sum of money found in the house?—A. Just money for an ice box, that's all.

Q. How much was that?—A. I didn't even know. That was my sister-in-law's.

The COURT. How much?

The WITNESS. It was my sister-in-law's gift to her mother, an ice-box.

Q. Where was that money found?—A. It wasn't found. [209] It was in the bureau.

Q. It was in the bureau drawer?

The COURT. How much money did you say was in the drawer?

The WITNESS. I didn't say no amount. I did not know how much money. My wife was handling that.

Q. Didn't you count out that money before you went out of the house, before they arrested you, to your wife, and give it to her?—A. The officer said, "You got the money. Just make sure the money—that you have your money", that's all, I wasn't asked to count no money. He asked me how much money I had. I told him I had $70.

Q. Isn't it a fact that you told the officers, when the money was found, "Why don't you help yourself?" or words to that effect, "It is Christmas time, and help yourself to that money?" —A. No. That was in reference to the policy numbers, and the money that I collected for the policy. They said they were looking for policy. I said "There is the numbers, and there is the money, if that's what you want."

Q. That was $700?—A. No.

Q. How much was that?—A. $70

Q. $70?—A. That's all.

Q. I understand you to say now that since you came out of the hospital you resumed your policy-collecting [210] activity? Is that what you want to say?—A. No. That was after I stood in the house for about eight months.

Q. Eight months?—A. I was under doctor's care.

Q. Then you went back to picking up policy numbers?—A. Yes.

Q. Is that right?—A. Yes, sir.

Q. When did you start that?—A. When did I start it? During the summer.

Q. The summer of 19—what? '50?—A. 1949.

Q. And you went around from place to place, in streets, and bars, and stores, picking up numbers? Is that what you want us to understand?—A. Where people I knew.

Q. You got around all right, didn't you?—A. No.

Q. With difficulty?—A. Yes.

Q. Now, there came a time when you were to be taken out of your apartment. You remember that?—A. Yes.

Q. You didn't want your wife to know what you were being arrested for, is that correct?—A. That's right.

Q. And you ask the detectives not to let her know. Is that right?—A. That's right.

Q. You asked the detectives to tell your wife that you were being taken in for some gambling violation. Is [211] that right?—A. No.

Q. What?—A. No.

Q. What did you tell him to tell your wife?—A. To tell her that they were taking me in for policy.

Q. For policy? And the detective told you that if your wife wanted to know, he would have to tell her that he was taking you in for drugs. Is that right?—A. Yes.

Q. And then you yourself were told to tell her that you were being taken in for gambling or policy, is that right?—A. No, I wasn't told that.

Q. Well, anyhow, the police officer, when your wife insisted, told her the truth, that you were being taken in for drugs. Is that right?—A. (No answer.)

Q. Is that correct?—A. I believe so.

Q. You were there?—A. I don't remember. I don't remember.

Q. You don't remember?—A. I was not too clear remembering.

Q. Then you went to the station house, is that correct?—A. Yes.

Q. By the way, you heard the officers testify here that they asked you whether you were hooked, meaning were you a user or an addict, and you say, in substance, "Hell, no. You think

I'm crazy?"—A. No. When they found the cocaine, they says, "What do you do with this?" [212] And as I said, I says, "Well, that's my kicks." They said, "You can't tell us that. We got too much on you."

Q. Did you ever say to the police officers when they asked you whether you used it, in substance, "Hell, no! What do you think? I'm crazy?" Did you say that?—A. No.

Q. In other words, you say you told the officers that you were a user and that this was your own stuff for your personal use?—A. I just told them that that was my kicks. In other words, that was my happiness.

Q. That you were a user?—A. I didn't specify that I was a user.

Q. That is what you intended, isn't it? That you were a user? And that was the stuff you had for your own personal use?—A. Yes.

Q. Is that right?—A. That was my intention.

Q. And you were in need of that drug on the same day, weren't you?—A. Well, I had just had some before they come in. They had found a little bag that I had more or less discarded in the house.

Q. That morning?—A. The same morning.

Q. In other words, you got the urge, the feeling, the desire, that you had to have it that morning, and you did have it. Is that right?—A. I always had it in the morning.

[213] Q. Is that right?—A. Yes.

Q. So that on that morning you say to his Honor and this jury that you were an addict and you had to have this stuff, is that correct?—A. Yes.

Q. Now, then, you went to the station house, didn't you?—A. Yes.

Q. And you were booked in the afternoon at the station house, is that right?—A. Yes, sir.

Q. You remember the desk officer that had to take down your pedigree and ask you questions, your name and address, and so forth? Do you remember that?—A. (No answer.)

Q. You remember that, don't you?—A. Yes.

Q. You remember him asking you whether you were a user of narcotics?—A. No.

Q. You don't remember that?—A. I was looking out the window. They had given him the pedigree.

Q. You were questioned by the officer, weren't you?—A. No, I wasn't questioned. They had asked me my pedigree before, and they gave it to him "Angelet, 25"——

Q. Weren't you asked by the officer there whether you were a user or not?—A. No.

Q. Of drugs?—A. No.

Q. You were not?—A. No.

[214] Q. You are sure about that?—A. Positive.

Q. Didn't you tell the officer at the desk there, at the time of booking, that you were not a user?—A. No.

Q. Never said that?—A. He asked the officers "What are you holding him for?" They said, "Section" so and so and so. That's all.

Q. Were you asked———A. I wasn't asked if I use it at all.

Q. The question by the desk officer if you were a user, and did you make the answer "No"?

Mr. GELB. I am going to object to it. I don't know whether the practice of desk officers asking questions——

Mr. LAPPANO. I will establish that, Mr. Gelb, in due course.

Mr. GELB. You can't establish that.

Mr. LAPPANO. Oh, yes, I can.

Mr. GELB. It isn't generally so.

The COURT. Objection is overruled. I will instruct the jury, if the answer is "No" they must not assume from the asking of the question that any such thing took place.

Q. You say that that did not happen?—A. No.

Q. Now, then you were brought the next morning to the Felony Court in this building, isn't that so?—[215]—A. Yes.

Q. And after you were held by the Felony Court, you were turned over to the prison authorities in the City Prison, is that right?—A. Yes.

Q. And you have been there ever since, is that right?—A. Yes.

Q. Now, you recall, after you were turned over to the prison authorities, on the morning of December 22, 1950, you were examined by a physician in the City Prison, isn't that so, as all prisoners are?—A. Yes, sir.

Q. Do you happen to know the name of that doctor that examined you?—A. No.

Q. But you were examined?—A. Yes.

Q. Did you tell him that you were a drug addict, and that you needed drugs?—A. No, he didn't ask me. He just says——

Q. You say he did not ask you?—A. No.

Q. Did you tell him you were a drug addict and that you needed drugs?—A. No.

Q. As a matter of fact, ever since December 22nd up to the present day, you have never asked for or indicated any need for drugs. Isn't that a fact?—A. That's right.

Q. So that you have no habit of needing drugs, isn't that so? During that period from December 22nd up to [216] this present time?

Mr. GELB. I object to that.

The COURT. Objection sustained.

Q. During this period of December 22nd until now?

The COURT. He said during this period, since his arrest, he has asked for no drugs.

Q. And you never had the urge, or need, for drugs. Is that right? Heroin or cocaine? Is that right?—A. Yes, I would like to have it.

Q. But you never had the urge? You say it used to make you sick. You had to have it as you needed it on the morning you were arrested?—A. I fought it. I fought it. I fought it.

The COURT. What is the answer?

The WITNESS. I fought it. I fought it.

Mr. GELB. I am objecting to the implication in the question. Do they give him drugs in the Tombs?

Mr. LAPPANO. If he needs it, and must have it, the city authorities do provide it, if you want to know, Mr. Gelb. They send them where he can get it. They don't have it here, but they send him where he can get it, under the jurisdiction of the Department of Correction.

Mr. GELB. I never heard it.

Mr. LAPPANO. Will your Honor indulge me just a [217] minute?

(After a short interval.)

Mr. LAPPANO. All right, your Honor, I think that's all.

Redirect examination by Mr. GELB:

Q. Do you have any reason for not saying that you were a user of drugs when you were put in jail?—A. I knew the discrimination and everything. I was in the Penitentiary, and I seen that when these fellows come in for drugs, how they were isolated and everything else. And I felt if I had to go away I did not want that to happen to me.

Q. What happened to you in the Tombs when you didn't have drugs?—A. I was bleeding from my nose for two weeks. I could not sleep; I could not eat; I had dizzy spells, and everything.

Q. Did you feel nauseous?—A. I used to throw up and get dizzy, and everything.

Q. You talked about money, $70 in your possession, at the time the police were in your house.—A. Yes.

Q. You said something about some other money for a refrigerator?—A. Yes.

Q. Where was that?—A. That was in the bureau.

Q. You said it was for a refrigerator. Whose money was that?—A. That is my sister-in-law's.

[218] Q. She lives with you?—A. Yes.

Q. The same house?—A. Yes.

Q. In other words, you wife's sister?—A. Yes.

Q. That was not your money?—A. No.

Q. Do you know how much was there?—A. No.

Q. What?—A. No.

Mr. GELB. That's all.

The COURT. That's all.

Gladys Nazar, residing at 527 West 134th Street, New York, New York, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. GELB:

Q. Do you live in the same apartment as the defendant?—A. Yes, sir.

Q. He is married to your sister?—A. That's right.

Q. Do you remember——

Mr. LAPPANO. You mean the same apartment, or same house?

Mr. GELB. Same apartment.

Q. Does your mother live in the same apartment?—A. Yes, sir.

Q. You, your mother, your sister, the defendant and how many children?—A. Three children.

Q. Do you remember December 21st when your brother-in-law was arrested?—A. Yes, sir.

[219] Q. Did you have any money lying in the house on that day?—A. Yes, sir.

Q. How much?—A. I had $400 that I had left with my sister, for a Frigidaire.

Q. Where did you get the money?—A. I worked, sir. I had the money saved. It was mine and my mother's.

Q. By the way, how many years have you worked?—A. Well, I have been working for the last eight years.

Q. Steadily?—A. Pardon?——Yes, on and off.

Q. What is your salary?—A. Well, I make—piece work—I make from $60 to $100 a week.

Q. And when had you given her the $400 to buy a refrigerator?—A. Pardon me?

Q. When did you give her the $400?—A. Well, the morning, before I left—I had left about—let's say 12:00 o'clock, I told my sister that the refrigidaire was supposed to arrive on that day.

Q. In other words, you had ordered it before that?—A. Yes.

Q. Did the Frigidaire come?—A. No, it did not come that day.

Q. When?—A. It came several weeks after that.

Q. At any rate, you paid for it?—A. That's right, sir.

Q. By the way, during the time you were living in [220] the apartment with your brother-in-law did you ever see him sniff any powder?—A. Yes, on several occasions I did.

Q. Where did you see him do it?—A. Well, the first time I saw him, it was in his bedroom. I happened to walk in accidentally, and he got quite nervous——

Q. Did he try to hide from you?—A. That's right.

Q. And you———A. I asked him because the powder was there. I asked him what that was. And he told me that he had been taking that since his accident.

Q. But you saw him on several occasions do it?—A. That's right.

Q. Did he hide the act from you?—A. Well, more or less he did try to hide it.

Mr. LAPPANO. Your Honor, I object to that.

Q. What I mean, did he do it openly, in front of you?

Mr. LAPPANO. Wait a minute. I object to what she says he told her, and ask that that be stricken out.

The COURT. Objection sustained.

Mr. GELB. Yes, yes.

The COURT. Strike it out.

Mr. GELB. He told her he has been taking it since the accident, should go out.

Q. But I say did he do it in your presence, or did [221] you come upon him———A. Well, I found him in my presence, I saw him.

Q. Did you come upon him in the few occasions by surprise?—A. Yes.

Mr. GELB. That's all.

Cross examination by Mr. LAPPANO:

Q. When did you first know that you were going to be called as a witness in this case?—A. Pardon me?

Q. When did you first know that you were going to be called as a witness in this case?—A. Well, yesterday.

Q. Yesterday?—A. Oh, not yesterday.—The day before yesterday.

Q. The day before yesterday?—A. That's right.

Q. And who told you that you were going to be a witness?—A. Oh, there was no definite thing that I would be a——

Q. Who told you?

Mr. GELB. I told her.—Wait a minute.

Mr. LAPPANO. May I ask her, please? I did not want to get into any——

Mr. GELB. All right.

Q. Who told you?—A. Mr. Gelb.

Q. What?—A. The lawyer told me.

Q. How did he get in touch with you?—A. Well, [222] he told me right here in Court.

Q. You happened to be here, and he asked you?—A. I came to hear—for the hearing, and he told me not to come in because he might call me as a witness.

Q. Were you told by anybody that it made quite a difference whether Angelet is found guilty of possessing drugs with intention to sell it, and just possessing drugs for his own personal use? Were you told that by anybody?—A. Was I told that it was any difference?

Q. Yes.—A. No, I was not told.

Q. Do you know that there is a difference between one who is charged with possessing drugs, with intention to sell them, and one who is just charged with drugs for personal use——

Mr. GELB. I object to that.

Q. Possessing for personal use?

Mr. GELB. I object to that.

The COURT. Objection sustained.

Q. So that you weren't told to come here by anybody and say that you saw him use stuff when in fact you didn't?—A. Pardon me. I did see him use it.

Q. You did?—A. I did.

Q. You assume it was drugs, of course?—A. I assume it was. It was a white powder.

[223] Q. Now, you have been living in the same apartment with George Angelet?—A. Yes, sir.

Q. And how long?—A. I have lived there for eight years.

Q. How long has he been living there?—A. He has been living there about four years.

Q. Four years?—A. Three years, in the apartment.

Q. Was he living there in December of 1948?—A. That's right. He was, sir.

Q. When he had the accident?—A. Yes, sir. The automobile accident you mean?

Q. Yes.—A. Yes, sir.

Q. And he was living there in July when he was shot?—A. No, he was not living there.

Q. Do you know where he was living then?—A. No. I had very little contact with him at that time.

Q. Do you know whether he did any work at all, since he came out of the hospital?—A. He used to help my father in the store once in a while.

Q. Other than that, did he do any other work?—A. Other than that I don't think so, because he was unable to work because of his physical condition.

Q. What did he do? Stay around the house all the time?—A. Most of the time he did, and sometimes he took the children out. They have three children, and they were [224] too much for my sister to take care of.

Q. By the way, do you know whether he was ever in the policy-collecting business, going out picking up numbers?—A. No, I don't know.

Q. You never heard that?

Mr. GELB. What difference if she heard it?

Mr. LAPPANO. Your Honor, may I continue?

Mr. GELB. I object.

The COURT. Objection sustained.

Q. But so far as you know, he was always around the house with the kids?—A. Most of the time. In the afternoon he usually took out one of the children. But in the evenings he was usually at home.

Q. Did you ever see him weighing any [illegible]s in the house?—A. No, I never did.

Q. You never saw that. Did you ever see him putting any in packages?—A. Well, there was one time when I found him putting some in a package, and he told me that he was going out in the street because he knew that by using that in the house it brought aggravation to my sister.

Mr. LAPPANO. All right, that's all.

Mr. GELB. Step down.

By the COURT:

Q. Did you ever have a bank account?—A. Yes, sir.

[225] Q. Savings?—A. Yes, sir.

Q. You still have it?—A. Yes, sir.

Q. Did you take that money out of the savings account, or was that cash separate from the savings account?—A. No, that was out of the savings account.

Q. You took it out at one time?—A. Yes, sir.

Q. When did you take it out?—A. Well, my mother was the one that took it out, because I have an account with her.

Q. When? What date?—A. The 21st was when that happened. It was about the 15th, I would say, more or less. I could not say exactly.

Q. The 15th you took out how much?—A. $400 for the Refrigidaire.

Mr. GELB. 15th of December?

The WITNESS. More or less. Because I went to put the order in, and they promised it to me. I could not tell you exactly at the moment.

The COURT. All right.

Mr. LAPPANO. All right.

Your Honor, May I be permitted to recall the defendant for just one or two more questions?

The COURT. All right.

George Angelet, recalled for further [226] cross examination, testified further as follows:

Cross examination continued by Mr. LAPPANO:

Q. Did you tell the police officers that—or rather who you had gotten the drugs in question here, that are in evidence, from?—A. No.

Q. You did not?—A. No.

Q. Where did you get those drugs?—A. From a seaman.

Q. A seaman?—A. Yes.

Q. Were you a seaman at one time yourself?—A. '41.

Q. You were a seaman at one time yourself?—A. Yes.

Q. For how long?—A. Well, I only took one trip.

Q. And you told the officers that you got these drugs in question from a seaman?—A. Yes.

Q. How much did you pay for it?—A. $100.

Q. $100?—A. Yes.

Q. For?—A. A half ounce.

Q. For a half ounce of pure heroin?—A. Yes.

Q. Is that right?—A. Yes, sir.

Mr. LAPPANO. That's all.

Mr. GELB. Step down.

*Defendant Rests*

The defendant rests.

PEOPLE'S REBUTTAL

Thomas W. O'Brien, detective, having [227] been previously sworn and testified as a witness on behalf of the People, being recalled in rebuttal, testified further as follows:

Direct examination by Mr. LAPPANO:

Q. O'Brien, after you took this defendant to the police station, and at the time of his being booked, were you present?—A. Yes, I booked him.

Q. You booked him. By that you mean you stood by—— Just tell His Honor and this jury what does that consist of, booking? What does that consist of?—A. When we bring them into the precinct, as soon as we enter the precinct door, we are under the rules and regulations of the Police Department. We have to carry out a procedure as a police officer. The prisoner is brought before a desk similar to the desk here (indicating). I identify myself and my squad. Previous to that I take his name, where he lives, his age, whether he is male, single, and his occupation, his date of his birth, and that's about all. Then I walk before the desk lieutenant, and I identify myself as a police officer, naturally. Then in the presence of the desk lieutenant I am required by the rules and regulations to search the prisoner in his presence. And I am to take from him anything that is to be used as evidence. I am to take from him anything that would be prejudicial to the good order, or anything that would mar [228] a prisoner——

Mr. GELB. Don't you want to lead up to something?

Mr. LAPPANO. Yes, I did not want to interrupt.

Q. Look, officer, you are now before the desk officer.—A. About to book him.

Q. And you are giving information now to the desk officer. Is that right? In connection with the prisoner that you have before him. Is that correct?—A. Yes, sir. The desk officer asks me "What is his name?" I give him the name, the last name first, and I spell it; the address. Then he asks me his

age. He asks me his occupation; whether he is a citizen or not. Then he comes down to the next line, he asks me my name——

Q. Suppose we stop at what he asks you. Does the desk officer ask the prisoner any questions?—A. Well, to the third particular line, the desk officer says to me "Is he a user of narcotics?" And in the presence of the desk officer, I turned to the prisoner, and I say, "Do you use narcotics?" And when a prisoner gives me the answer, I transmit it to the desk officer.

Q. That is within the hearing of the desk officer?—A. Yes, sir.

Q. And that is entered into the book?—A. Yes, sir, it is part of the form.

Q. Part of the form?—A. Part of the arrest record.

Q. On this particular day did you follow that police [229] procedure?—A. I did.

Q. And did you ask the defendant, in the presence of the desk officer, whether he was a user of narcotics?—A. I did.

Q. And what did he say then and there?—A. He was not.

Q. And did you tell that to the desk officer?—A. I did.

Q. Did the desk officer hear what the defendant said, the prisoner, to your knowledge?—A. To my knowledge, yes.

Q. It happened right in his presence?—A. That would be an official record of the department. If he heard it or not, he makes the entry; I don't.

Mr. LAPPANO. That's all.

Cross examination by Mr. GELB:

Q. He makes the entry after you tell him. Right?—A. Yes, sir.

Q. Let me get this straight. You testified you were up in this apartment for a couple of hours or maybe less; and you had questioned the defendant about each item. And you had questioned him about the heroin and the cocaine. You testified to all that the defendant said to you: "I used to be in the racket." At first he said that. And then he said, "Well, selling narcotics [230] is my racket." You testified you asked him whether or not he used it, and he answered, "Do you think I'm crazy?" Right?—A. That's right. Yes.

Q. Then when you got to the police station you turned to the defendant, you say, and asked him "Are you a user?"—A. Your version of it is very nice, but, as I say——

Q. Did you turn to the defendant and ask him "Are you a user?"

Mr. LAPPANO. May he be permitted to answer.

Mr. GELB. Sure he can be permitted.

A. I am guided by the rules and regulations of the department——

Q. I don't care about that.—A. I know you don't care about it.

Q. I know what the rules and regulations are, and I know there are rules——

The COURT. Did you ask him that?

The WITNESS. I knew that I was required to ask him, and I asked him in the presence of the desk officer.

The COURT. Was that part of the rules and regulations of the Police Department?

The WITNESS. Yes, sir, it is.

Q. You turned around to the defendant and asked him "are you a user" in the police station?—A. I did it because I am required to do it, and that is the way I did it.

[231] Q. Because you were required to do it, you turned around and asked Angelet "Are you a user?" Is that what you testify?—A. If I had asked him 15 times before, I would still have to ask him.

Q. I say you turned to him and asked him what? "Are you a user?"—A. The desk officer says to me——

Q. Did you——

Mr. LAPPANO. Your Honor, I object to this interference while the officer is answering.

Mr. GELB. What is the difference?

Mr. LAPPANO. Do you want to shut him off? It was responsive.

Mr. GELB. It was not responsive.

All right.

Mr. LAPPANO. I ask your Honor to permit him to answer the question.

Q. I ask you, what did you say to Angelet in the police station concerning that? Words? What words?—A. As I say, as he is booking him; at a certain part of the booking, the desk officer says to me——

Q. "Said" to you. "Said" to you.—A. Excuse me.

Q. Did he?—A. He said to me. The desk officer said to me "Is he a user of narcotics?" And I am required to turn to the prisoner in the presence of the desk officer——

[232] Q. "I turned to the prisoner." Is that what you did?

The COURT. Did you? And then what did you say to the prisoner?

The WITNESS. "Do you use narcotics?" And he said "No."

Q. And then what did you do?—A. I said to the desk officer, "He does not use narcotics."

The COURT. All right.

Q. That is a fact? That is what happened?—A. Yes, sir.

Q. All right. Incidentally, since Fitzgerald testified, something occurred to me. You said that Schein had 'phoned, and after the 'phone call a Federal Narcotic Agent came?—A. I said that Schein 'phoned.

Q. Schein 'phoned, used the 'phone?—A. Schein used the 'phone, yes.

Q. And after a while, a Federal Narcotic Agent came into the apartment?—A. That's right.

Q. And then you said "When we left, the three of us, Schein, I and the Federal Narcotic Agent, and the defendant—the four of us, went to the station house."—A. That's right, yes.

Q. What happened to the fifth?—A. I don't know what happened to the fifth.

[233] Q. Was he there?—A. I did not see him there when I was there. I saw him going out of the place.

Q. Did you see him come into the place?—A. No, I did not.

Q. There was a fifth? There was another Agent there?—A. There was another Agent there, yes.

Q. And you did not see him?—A. I saw him, but I made no——

Q. A moment ago you said "I didn't see it."—A. I didn't say I did not see him.

Q. I assure you you did.—A. You said when I was in the apartment, did I see him? At that one particular phase. It did not phase me that much. I did not see him, but going out I knew there was another Federal Agent there.

Q. You remember what you testified about?—A. I remember what I testified about.

Q. And you left out the other Agent completely?—A. I did not leave out the other Agent completely.

Q. What happened to the other Agent when you went to the station house?—A. I don't know.

Q. Did he go?—A. I don't know whether he did.

Q. Who went to the station house?—A. Detective Schein, myself and the prisoner, Angelet.

Q. What happened to Fitzgerald, and the other man, Ferro?—A. I don't know what happened to them.

[234] Q. Didn't they ride to the station house?—A. With me? No.

Q. Not with you. In their own car, or something?—A. Detective Schein and myself. I don't know where they went.

Q. By the way, what station house did you go to?—A. 30th Precinct.

Q. That is where?—A. That is upon Amsterdam Avenue.

Q. 152nd?—A. It is around there some place.

Q. Is that 152nd?—A. I don't know. I think so. It is up there some place.

Q. 152nd, on Amsterdam?—A. I know it is on Amsterdam. It is on the northwest corner. It is around there some place.

Mr. GELB. All right, that's all.

May I call Fitzgerald for a moment.

The COURT. Just a moment.

Mr. GELB. I want to find out about that.

The COURT. All right. Call Fitzgerald.

Benjamin J. Fitzgerald, Federal Narcotic Agent, having been previously sworn and testified as a witness on behalf of the People, being recalled for further cross examination by the defendant, testified further as follows:

[235] Cross-examination continued by Mr. GELB:

Q. Mr. Fitzgerald, did you say after you left the apartment you went to a precinct?—A. I followed them over in the car. O'Brien, Schein and Angelet got in Schein's car, and they went over to the precinct. I got in my car with Agent Ferro, and I followed them. I did not go into the precinct.

Q. But you followed them to the precinct?—A. Yes.

Q. And you said you went three blocks?—A. I didn't say that.

Q. What, then?—A. Well, you asked me where the precinct was.

Q. I didn't ask you that.—A. You didn't ask me?

Q. I did not. Mr. Lappano might have asked you.—A. I didn't say it was three blocks. I don't know how far it was.

Q. Didn't you say it was three, three and a half blocks?—A. No, I didn't say that. At least, I don't think I said it. I don't know how far it is.

Mr. GELB. All right.

Redirect examination by Mr. LAPPANO:

Q. Just a moment. If you did say it was three or three and a half blocks, ———A. I said it was on Amsterdam Avenue.

Q. If you said it was three or three and a half [236] blocks, you didn't mean that, did you?—A. Did I say it? I don't know.

Q. I don't recall whether you did or not.

Mr. GELB. I am pretty certain he said it.

Mr. LAPPANO. All right.

Q. You went to wherever the 30th Precinct is?—A. That's right.

Q. Do you know now just where it is?—A. Right now I don't know where the 30th Precinct is. It is somewheres on Amsterdam Avenue.

Recross examination by Mr. GELB:

Q. You left the apartment with Ferro?—A. That's right.

Mr. GELB. O.K. The defendant rests.

Mr. LAPPANO. Officer of the 30th Precinct.

John Minogue, Patrolman, Shield No. 19296, attached to the 30th Precinct, New York City Police Department, called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. LAPPANO:

Q. Officer, did you, pursuant to a request of the District Attorney's office, today produce here a book known as an Arrest Book?—A. I did, yes.

[237] Q. Is this it? [Showing book].

Mr. GELB. Maybe you can get a concession on this.

Mr. LAPPANO. All right.

Mr. GELB. What do you want to prove? In the book it says "No user"?

Mr. LAPPANO. Yes.

Mr. GELB. I will concede that.

Mr. LAPPANO. All right.

I want to prove that on December 21st, 1950, at the time of the booking of this prisoner, there is an entry here, made by the desk officer—his name appears here—I think it is Lieutenant Barry—that alongside of where it says "Drug addict", there is an entry "No."

Mr. GELB. Yes, the officer testified he told the booking officer "No."

Mr. LAPPANO. And that was done?

Mr. GELB. As appears in the book.

Mr. LAPPANO. And that there, alongside there, it says "No." And it is signed by Lieutenant Barry, the desk officer?

Mr. GELB. Certainly. I will concede that this arrest record shows that.

Mr. LAPPANO. All right.

The COURT. That's all.

Mr. LAPPANO. May we have just a two or three minute [237a] recess, Judge? I am waiting for Doctor Sisca; he is coming from the City Prison.

The COURT. We will take a five minute recess. You are admonished not to discuss the case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, and form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you.

[238] (Trial resumed after short recess.)

Francis Sisca, M.D., residing at 125 East 95th Street, New York, N.Y., called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. LAPPANO:

Q. Dr. Sisca, you are a physician duly licensed to practice medicine in the State of New York?—A. I am.

Q. Do you also maintain a private office for the conduct of your profession?—A. I do.

Q. In addition to that, are you also employed by the Correction Department of the City of New York on a part-time basis as a physician?—A. I am.

Q. And is your assignment at the City Prison here in New York County?—A. That's right.

Q. How long have you been there?—A. Oh, about ten years.

Q. About ten years?—A. Yes.

Q. And what are your duties there?—A. To examine and treat patients—inmates.

Q. Are you acquainted and do you know this prisoner, this defendant, George Angelet?—A. Yes, I do.

Q. When did you first see him?—A. [Consulting book]. On the 22nd of December, 1950.

Q. When you examined him what did you find?— [239] A. Old spinal injury, 1949; and a left hemoplegia—paralysis—partial paralysis.

Q. Did you find anything else?—A. That's all.

Q. Under the rules of procedure you ask questions of these prisoners at the time you examine them?—A. I do.

Q. Particularly do you ask them whether they are users of drugs?—A. I do; yes.

Q. And do you note in your record if they are users of drugs?—A. I do.

Q. And in connection with George Angelet——

Mr. GELB. Before you answer——Go ahead.

Q. In connection with George Angelet, did you ask him whether he was a user of drugs?

Mr. GELB. I object to it on the ground it is not rebuttal.

The COURT. Objection is overruled.

Mr. GELB. Your Honor, he testified he did not tell anybody.

The COURT. All right.

Mr. GELB. He did not tell any——

Mr. LAPPANO. All right.

Mr. GELB. All right.

Q. Did you ask him?—A. Yes, I did.

Q. What did he say?—A. He denied the use of drugs.

Q. Did you also examine him with respect to any symptoms or evidences of having used drugs?—A. Yes; he had [240] no marks.

Q. No marks of any kind?—A. No.

Q. During your regular work there you have come across those that are addicts and users of drugs?—A. Yes.

Q. A person who sniffs cocaine or heroin over a period of time, would there be evidences in the nostrils of having used it?—A. There might be some inflammation.

The COURT. Did you examine his nostrils?

The WITNESS. No, I did not examine his nostrils.

The COURT. The marks that you mean, you looked to see whether there were any puncture marks by use of hypodermic needles?

The WITNESS. That's right.

Q. During the time that he was in the City Prison, how many times have you seen him?—A. I saw him four times.

Q. During any of those times did he ever complain to you of anything that appeared to be symptoms of drug addiction?—A. No, he did not.

Q. Did he ever express any craving or need for drugs?—A. No.

Q. Under the rules of the Department, if one is a drug-user, and in need of drugs, does the Department have the facilities to furnish those drugs, and do they furnish those drugs in cases of need?—A. No, we don't furnish drugs.

Q. What do you do?—A. We just treat them symptomatically. [241] In case they have heart trouble——

Q. How about a case where a person does need drugs and must have it? What do you do with them?—A. Well, we give them some sort of sedative; not narcotics.

Q. For narcotics do you send them to Rikers Island if they must have drugs?—A. Not necessarily; no.

Q. Do you?—A. No, we don't.

The COURT. You give them a sedative to calm them down?

The WITNESS. That's right.

Mr. LAPPANO. All right.

Mr. GELB. I told you that was the practice.

Cross-examination by Mr. GELB:

Q. By the way, where is the entry of the first examination?—A. Right here [indicating].

Q. Wasn't there some other doctor examined him on that day?—A. Some other doctor?

Q. On that day.—A. I don't know.

Q. Did you examine him on that date?—A. 22nd.

Q. And how many patients did you examine on that day? All these? [indicating].—A. All those, yes. And these [indicating].

Q. How many hours do you put in there?—A. About two hours.

Q. Two hours?—A. Yes.

Q. [Counting names on books.] You examined 63 patients [242] in the two hours?—A. That's right.

Q. You really examined 63 patients?—A. Examined? Well, I find out what is wrong with them.

Q. Your entry is that he had a spinal injury and paralysis?—A. Yes.

Q. What is the next date of examination?—A. January 16th. The same as the first time. I gave him some phenacitin.

Q. And the next after that is the 18th?—A. Yes.

The COURT. What did you say about phenacitin?

The WITNESS. That is for pains. That is just the same thing as the first time.

Q. Did you give phenacitin again?—A. Aspirin.

Q. Then on Monday of this week you examined him?—A. 29th. Left hemoplegia caused by gunshot wound in the spine. The same thing.

Q. Also the same thing?—A. Yes.

Mr. GELB. O.K.

The COURT. All right. That's all.

PEOPLE AND DEFENDANT REST

Mr. LAPPANO. That is the People's case.

Mr. GELB. The defendant rests.

The COURT. Will both counsel step up?

(Counsel on both sides approached the bench, and the following proceedings were had at the bench out of the hearing of the jurors:)

MOTION TO DISMISS AND DENIAL THEREOF

Mr. GELB. I renew the motion made at the close of the [243] People's case on the same grounds as set forth then.

The COURT. Motion denied and exception.

Mr. GELB. Exception.

The COURT. If there are any requests to charge, I would appreciate it if you would submit them to me in writing before summations.

(Proceedings resumed aloud in the hearing of the jurors.)

The COURT. Members of the jury: I have conferred with counsel on both sides, and they tell me that their summations will take about a half hour a piece—that is, a half hour for each side. Under those circumstances, if it meets with your approval, I will ask you to be here at ten o'clock sharp tomorrow morning. We will start summations, to be followed by the charge, before the call of any calendar, so that you may retire for deliberation while I am carrying on any other business that may be before the Court.

Now, you are again admonished not to discuss this case with each other, permit anyone to talk to you about the case, nor remain in the presence of anyone discussing the case. You are further admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you. Please be on hand at ten o'clock sharp.

(Thereupon the further trial of the case was adjourned until the following morning, February 2, 1951, at ten o'clock.)

[244] *People* v. *Angelet*

February 2, 1951

(Trial Resumed)

(Court met pursuant to adjournment)

(Appearances: same as heretofore)

(At 10:10 a.m. Mr. Gelb commenced to sum up the evidence to the jurors, on behalf of the Defendant, as follows:)

## Closing statement for defendant

Mr. GELB. May it please Your Honor, Mr. District Attorney, ladies and gentlemen of the jury: I made a few observations when selecting the jury concerning the functions of jurors and concerning the signifiance of a jury in our system of administration of justice, and I want to make a few more because I think it will help in enabling you to determine the issues in this case.

Under our system of government a jury is sovereign. A jury, in the administration of justice, is more important than the Government itself. Some people have the idea that jurors are inferior to Government. Well, that isn't so. Government is an agency created by people. Jurors stand between Government—in this instance between the State—and the individual. Jurors stand between the freedom or the deprivation of freedom of an individual. A jury is answerable to no one for what it does. A jury is answerable to its own collective self. It is answerable to its own conscience, and nobody else.

It was never intended, under our system, that [245] it should be made easy for Government to convict. And I say that with a full realization of the import of the language. It was intended that it should be made hard to convict somebody in this State as well as in our Government. And there is a reason for that: because all the philosophers who taught and still write on political science point out—and the average person loses that, and has no realization of that—the average person thinks Government is the ultimate, whereas the art of political science teaches us that the individual is the ultimate. In other words, each individual is more important than Government. Government is nothing more than an agency with powers ceded to the Government—ceded to Government, given up to Government by the individual. But the essence, the individual, the dignity of the individual, the freedom of the individual, his liberty, is more important than Government. And I stress that because I can't emphasize it too strongly, because the in-

dividual is inclined—as a matter of fact, he normally tends that way—he is inclined to regard himself as a lowly human being, but a small cog in the great machinery of Government. Well, in practice it may work out that way; but in essence, but in truth, he is sovereign; he is all-powerful.

In other words, whatever you do in this case, each of you, whatever you decide in this case, I want you to decide with a full realization that you are all-powerful; subject [246] to carrying out the law of the State, subject to adherence to the laws of the State, you are completely sovereign. In you rests a greater power than rests in our State Government or in our Federal Government.

When you pass upon the issues presented to you, you pass upon them with finality; you pass upon them, immune from criticism, immune from any necessity or compulsion to explain, to account, or in any way have to give reasons for your results, except to yourselves.

Now, that is true also of agents of Government. In other words, that is true of a policeman; that is true of a Federal Agent: namely, they come before you in this court room as servants actually employed by you. Never mind this fiction! The general impression is that when a man holds an office he is more important than the individual, whether it's a policeman, or a Federal Agent, or a district attorney, or anybody else. That is not so. They are but servants. And servants employed by people in many instances in history—in the history of our own country, in many instances—because of the weaknesses of human beings, have a tendency to become all-powerful, more powerful than the assignment given to them should make them. They have a tendency to become somewhat tyrannical. As a matter of fact, Government has a tendency to become tyrannical. That's [247] why, under our system, there are safeguards, many of them thrown around the individual so Government should not become too powerful. The founders of the Constitution of the United States and the originators of Government in this country all recognized that Government was a certain form of tyranny, and safeguards had to be provided for in order to save the individual from tyranny.

I don't want to stand here and sound like a lecturer just to inflate my own standing. That isn't my purpose: to make myself look a little more important than the next person as a student of history and politics and government. That isn't my purpose. But I want to set the case in proper focus; and before I can do that, I think it is necessary for all persons sitting as jurors to recognize that: that you are more powerful than Government.

Now, conveying that thought to you in that setting, I should like you to approach the facts in this case. I should not like you to approach the facts in this case, the issues which are to be determined by you, in the abstract, or without a complete understanding of your position.

I told you quite frankly, when this case started, what my notions of the facts were. And in telling you, I hope it has become clear that I was not in any way saying anything but the plainest, the frankest recital of the facts in the case. In other words, I don't believe that a lawyer [248] contributes anything to the trial of a case unless he is frank. Nor do I approve of the tactics employed by some in throwing dust into your eyes, in trying to obscure issues, in trying to keep facts from you.

I believe that a normal, intelligent, American jury, a cross-section of human beings from every walk of life, is in a very good position to understand and to determine where the truth lies, if given an opportunity, if given a fair opportunity to determine it. And so I say to you, my effort here has been to make it possible for you to get the facts as clearly as they possibly could be given.

I started by saying to you I represent a criminal. That's a fact. I represent a criminal. I pointed out to you that whether it is this criminal or whether it is a man without any previous criminal background, that the case must be judged objectively—as a matter of fact, more so where you have this type of defendant, more so. And I mean that more so, because the average individual, whether he be in the District Attorney's Office or whether he be on the outside, when he is passing judgment on a criminal, a confessed criminal, a confirmed criminal, has a tendency to figure: "Well, there isn't

much good in him. Why waste time? Why waste time going through the niceties, the distinctions, going through the subtleties, perhaps, of the facts, and the credibility of witnesses in this case?" That is perfectly [249] plain to me: the normal, the average, person has that tendency. But where you have a defendant who starts with a handicap—that's his own fault: it is not your fault; it is not my fault—it is your duty to be very careful lest you lose your objectivity.

I know from my own experience there have been many times when men, looking at a criminal record of a defendant, had a tendency to say—I am talking about prosecutors, and I have had some experience in that direction—"the defendant is undoubtedly guilty." And I have always felt that it is a mistake to act on anything but the facts in the instant case. And if you do that, you will have done your duty well.

Now, let us analyze the facts in the instant case. "All things that glitter aren't gold" is the old proverb or aphorism. There are certain surface manifestations: a package of exhibits, materials submitted before you: that naturally has a tendency to put the case in a certain light. But there is also the need for analysis so that we can decide whether or not these properties don't throw the case out of focus and really don't put the case in a wrong light.

The man possessed narcotics. I told you that when we started this case. He is guilty of a crime. He is guilty of violating the second count in this indictment: the [250] possession of narcotics, which is a crime.

The first count in the indictment charges him with possession of narcotics with an intent to sell—intent to sell. And you have a right to decide from the circumstantial evidence in the case—because this is circumstantial evidence. The intent to sell must be inferred from circumstances, because there was no sale. And that will be your duty, your job: to determine from circumstantial evidence whether or not he intended to sell. There is a problem, and a real problem. And I am not stupid, and I recognize that it's a difficult problem, particularly for me, in the light of the testimony of O'Brien and Fitzgerald.

As I stand here, in analyzing their testimony I must accuse those men, I must destroy them as tellers of the accurate truth

in this case. I say that they did not tell you the truth, they colored it, they tried to prejudice you—and for a very good reason: first, the defendant has a record of convictions, robbery and burglary. He has a record of several arrests; he has a record of violating his parole.

The defendant spent his life, up to fifteen, in institutions. From then on he was virtually a criminal, whether he took policy, whether he ran crapgames, whether he committed more burglaries or more larcenies. His whole adult life—and he's only reaching 26—has been spent in a life [251] of crime. And I say to you he has committed a crime, and he should go to jail.

Now, in none of those arrests do we find him charged with possessing or selling narcotics. And when Detective O'Brien goes to the house and finds envelopes, and asks him about the envelopes, he says "Well, you know, I used that when I was in the racket: selling narcotics."

Now, just try to figure that out for yourselves. You know, I am not given to glib statements, and I am not given to careless statements. Here is a man who has narcotics in his house. He knows that. And he knows there is a chance of finding them. There is not only a chance: the probability is that they'll find them. He has no criminal record for narcotics in any way; no suggestion in his record of dealing in narcotics. And the probability that the officer would find the narcotics in his house. And he says to O'Brien, when he showed him the envelope, before he found the narcotics, "Well, you know, I used that when I was in the racket of selling narcotics." How could that possibly be so: that a man who is hardened to a life of crime, without trying, without any compulsion, would say to the police officer right off, "Yes, I was in the racket of selling narcotics."

Now, to be perfectly honest about it: the policeman [252] and the Federal officer say they knew he was a narcotic man. And I will discuss that with you, and I will discuss why I let them bring that out. Because you will notice in this case I asked questions which will enable an officer to testify to hearsay: in other words, to give what he heard, what he was told by people. I did that purposely, and for a reason: because I

know enough about the rules of evidence to confine a witness to the giving of testimony that he saw, testimony concerning what he participated in. In other words, a witness can't give testimony about what he thinks, or about what somebody else told him. He can only give testimony as to that in which he participated. But I let these detectives say a lot more, and for a reason. And I'll explain the reason to you in a few minutes.

But is it conceivable that this man, who never was convicted or arrested for narcotics, his record is clean of that,—is it conceivable that he, upon the finding of envelopes, would say to the policeman, "I was in the rackets; I used that when I was in the rackets"? If—and it was probably to happen in a short time—if they found the narcotics, that, I am sure, would weigh heavily against him, very heavily. And a man of the slightest degree of common sense, and a criminal, and to be sure, a criminal who knows that what he says to a cop is [253] going to bury him, would be the last person in the world to make such an admission.

Then when he found some capsules, he said the same thing: "I didn't bother to get rid of them. I used them when I was in the racket."; The same with the stapler: "I used it when I was in the racket"; the scale: he used them when he was in the racket. Now, this is all before they found a particle of narcotics. And he is admitting to the cops that he was in the racket of selling narcotics. I say to you that is not so. And I will explain to you in a few minutes why it is not so, and why the officer said it.

Likewise, the same with Fitzgerald: he said when he found the mug—the jug of milk sugar, he said "I used it to cut drugs with." Before he found the drugs, before Fitzgerald found the drugs, he is admitting, according to Fitzgerald, that "I used the milk sugar to cut drugs."

Now, is that conceivable? In other words, he is making admissions; in other words, he is using the milk sugar now, at the time that they found—that they were examining his house, at that time he says "I am now using"—so he is saying—he is going a step further—he is saying that "I am now a possessor of narcotics." Maybe yesterday; maybe the day before. He

doesn't say "I have got it in the house," but "I am using it", in the present time. He [254] is admitting it. And that is before they found any drugs!

What do you think? You saw this fellow. When they asked him, "What's your connection? Where did you get the drugs", he wouldn't tell them. He tightened up completely. I suppose that's the code. I'll match—I don't care whether a man is a criminal, I don't care how low a man may be, how antisocial, I don't care about that. But in determining where the truth lies, I have a brain, and you have brains. You subject testimony to an objective analysis. You try to determine whether it is inherently probable, or whether it has an inherent truth to it. That's the way to determine it: not the way a man looks on the witness stand. I don't care how a man looks. I have seen some of the most respectable-looking people on the witness stand, took one look at them, heard them answer one question: there were times when I said, after hearing a man answer one question, "he's strictly phony." So, I mean, that doesn't govern. That's the least of it.

In determining where the truth lies, you've got to analyze, you've got to see whether it is probable or whether it defies probability. I say it's not probable. And any intelligent examination of those facts will convince you that it wasn't probable. And, I say again, in a few minutes I'll tell you why that's in the case, why they told you that. But nobody could tell me that this fellow, before they found [255] the drugs, admitted he was in the racket; that when the Federal officer found the jug he admitted he was using it to cut narcotics; before they had anything on him he was making these admissions. That to me is strictly bunk, because it isn't plausible, it isn't likely, it is highly improbable.

Now, then, O'Brien—incidentally, about the scale, he said he used it in the racket: he admitted he used the scale in the racket. O'Brien said he had never seen a scale like that. The defendant said he got the scale in connection with some set. It looks to me like a souvenir or a novelty type of scale. At any rate, O'Brien says it is used for envelopes, for mail. You can use it for narcotics: there is no question about it. You can use it for weighing narcotics. But there, again, he is admitting

he used it for weighing narcotics, before they had anything on him. Apply the test of common sense. Analyze that!

And let me tell you something: if you reach the conclusion that O'Brien is loose with his tongue, and, so far as this defendant is concerned, feels morally justified in putting it on, adding something that never took place, that doesn't lessen the importance—or, I should say, the seriousness—of such behavior.

You know, a man gets on the witness stand, sticks a badge [256] on his coat, he's no different than any other man. You know, O'Brien testified when he took the defendant to the station house, and the booking officer asked him "Is the defendant a user?" Do you remember that testimony, where the man who keeps the book—the officer who keeps the book, who writes in it—the testimony that he asked O'Brien, and O'Brien is supposed to have asked the defendant whether he is a user? And he said the rules require him to ask it. The interesting part of that is this: the rules require him to ask it. The man is under oath. He is answering my questions. And I am asking him. And I asked him, "You had talked to the defendant in the apartment? He told you he was not a user. You were convinced he had narcotics with an intent to sell. You said he admitted that he was in the racket of selling narcotics. You were convinced that he was in the racket of selling narcotics. When the officer at the desk asked you if he was a user, you turned to the defendant and asked him if he was a user?" He said, "Well, I have to observe the rules. Yes, I turned to him and asked him 'Are you a user' "?

That isn't true! That's preposterous! And I am not saying that lightly. That's absolutely ridiculous! You picture O'Brien, who said he regarded this fellow as a dealer in narcotics; Fitzgerald had him as an international [257] smuggler—I will address myself to that in a few moments—I mean, they were certain in their own minds that this man was a seller. Now, I ask you, do you believe that he turned around to him and asked him, "Are you a user?" And then he turned back to the officer and said, "No." Strictly bunk! But he's under oath. He's under oath. And he's careless of an oath.

I don't care about what's in the book in the station house. I don't care whether he asked him or didn't ask him. That is of no importance in this case. The only reason I asked the question is because it appeared so absurd to me that I wanted to demonstrate that O'Brien is careless with the truth. And if he could be careless with the truth as to that, and if the inherent improbabilities of the other admissions indicate that he is careless of the truth, your duty is to reject it and say "I can't believe that witness." Yes, I believe he found narcotics. I believe he was up there, he talked with the defendant, he arrested him. But I say to you that you cannot believe the testimony with respect to the conversation, before they found the narcotics and after. And after is worse. Because, under no compulsion, they find the narcotics, and the defendant says, "Oh, that's my racket, selling narcotics; the last two years." Fitzgerald said "the last four or five years", he said. Fitzgerald said that this defendant said, "I have been selling four or five [258] years." O'Brien said "Two years."

But mind you: he knows—and you certainly can realize how he would know; he had narcotics in his possession for a long time—many times. He certainly knows that if he sells it, or intended to sell it, he is guilty of a more serious crime than if he just possesses it. Now, picture that: a defendant, a criminal, without compulsion, without pressure, admits to the police officer immediately—admits "That's my racket. I have been selling this stuff for the past two years." If you believe that—well, let me put it another way: I say it takes a certain amount of naivete to accept that.

Now, why did they do it? I mean why did they say, "Oh, he admitted it?" Why did both of them say that? Incidentally, O'Brien is rather careless. You notice, he testified that Fitzgerald came up after his partner, Schein, phoned him. He did not mention a word about another officer. And you remember, when he was back on the stand, put back by Mr. Lappan toward the close of the evidence, and I asked him about it, do you remember how he responded? "What other man? Yes.—Yes." Of course, by then I tipped him off. There was another man there, another Federal officer. He had never said a word about the other Federal officer. He said,

"The four of us, Schein, I, the defendant and the Federal officer"—"four of us went to the station house." He never said a word about the fifth—the Federal agent—the fifth man. He didn't even know. He said, "Well, I think he was in; he left [259] with him." He was very confused as to that. How much attention was he paying to this business? He went up there. He was certain he had a man who was a seller. He felt sure he would find narcotics. He found narcotics. "Well, he's a seller. That ends it. It's a cinch!"

I will tell you my reason on this, why I think he was so careless about this and said the defendant admitted. This defendant is in a very awkward situation. He is charged with crime. He comes into court. He is in a dilemma. What can he do? The officer says he's a seller; he possessed narcotics. What could he do? Deny it? Sure! The officer knows perfectly well that if he denies, he has to take the stand. The officer knows perfectly well that if he takes the stand, well, to use a very common expression, he's "loused up"—a Police Department expression; he's really in bad shape. Because if he takes the stand, the District Attorney has a right to ask him about his whole past. And if he asked him about his whole past, something would come up: that he's a criminal; and what chance would he have against an officer? So it is perfectly easy, in a case like this, for an officer to feel, "Well, you can clinch this by putting in an admission. So what's the difference? We find the material there, and he must be in the racket. The defendant admitted, 'That's my racket'." Not even qualifying it; not even saying, "Well, I sometimes sell the [260] stuff", or something similar. No. "Selling narcotics is my racket."

I say the officer never expected that I would be so frank as I have been in this case; that I would open to you and tell you I represent a criminal, he has been convicted, and so on, and so forth. The defendant would have to take it lying down. What's the difference?

Now, let me explain, if I can, the psychological reason for both Fitzgerald and O'Brien being so loose with the truth so far as statements are concerned.

I let them talk. Believe me, I have at least that much experience that I could prevent Fitzgerald from saying, "This

man is an international smuggler." You can almost take judicial notice of it. There are ways of asking questions. And I let him talk. I gave him a wide berth. I gave O'Brien a wide berth.

Now, here is this young fellow, Fitzgerald, who says he is an international smuggler of narcotics. He hasn't got—mind you: and for five years, he said. Now, what attention did he pay to this "international smuggler of narcotics?" Two observations, that he could remember, in the last three years! Does that jibe? Do you believe that, that he regarded him as an international smuggler? Yes, he probably regarded him as a narcotic dealer. He probably regards a great many people as various types of criminals. He could be wrong in [261] many instances. You know, these men get information, and sometimes they get information that is exaggerated, and sometimes they get information that is colored, and it's wrong. For instance, here there was information that there was a gun in the house. They didn't find any gun. So you see, the information was wrong.

Every man in the prosecutor's office begins to form opinions about different people. And sometimes they permit themselves to accept a hearsay as almost a fact. You've got to steel yourself against that. No man can mature to intelligence unless he has within himself a healthy skepticism. You must have a healthy skepticism in your makeup, otherwise you can't mature to real intelligence.

So I say this: there is a tendency on the part of men in public office, when they hear one man say, another man say, maybe they hear it a half dozen times, so-and-so is in the bookmaking business. Somebody will say, "No, I think he receives stolen goods." Well, they'll argue that out, and they could go on for a couple of years. In the meanwhile, the defendant, that man, has never been arrested or charged with any crime. Now, it doesn't mean that sometimes the information isn't correct. But I want to point out that sometimes the information is wrong.

Now, he regarded him as a smuggler. Incidentally he [262] regarded him as a narcotic seller.

The mortality rate—mortality in courts—in other words, the number of times a man gets pinched for doing overt acts, depends on the type of crime he commits. I always used to say, when we had a case in the court of a man charged with, let's say, burglary, and charged with a long record, and the evidence did not establish beyond a reasonable doubt the fact that he committed that particular burglary, I used to say "Forget about it. He'll be back in a short time, if he's a burglar." In other words, the mortality rate in crimes of that type is high. They get caught. If Fitzgerald believed he was an international smuggler, do you think he would concentrate that minimum of effort he talked about? He observed him twice, for an hour or a little less. Does that jibe with his statement that he thought he was a smuggler? Strictly hokum! If his Department thought he was a smuggler, they would concentrate some effort on the man, not just casually observe him. Ridiculous! And what's more, I say that common sense should tell you that if the man is engaged in the sale of narcotics for five years, for two years, there would be a record of an arrest. The mortality rate is too high, because these are overt acts. You can't sell without meeting somebody. You must meet somebody. You must give some-
[263] body something. And there are too many opportunities for police to detect it, for this man to have escaped even a record of arrest on that.

So I say they felt, from whatever they were told, and from whatever sources they could draw, they felt this man was a seller. If they felt he was a seller, the rest is negligible, the rest is unimportant. What difference does it make? "Of course he admitted he was a seller."

As a matter of fact, the man is a lawyer. Fitzgerald is a lawyer. And he knows—believe me—he knows—that he was testifying to hearsay when he branded this fellow a smuggler. And so far as he is concerned, the defendant is a seller, he is guilty of intending to sell. Bury him! so far as he is concerned. I say that his psychology is such that probably he would be wondering why we're wasting time here even discussing the facts as minutely as I am discussing them here now. We don't do that. We don't attain them. We don't sentence men unless there is evidence beyond a reasonable doubt, evidence to a moral certainty, that he intended to sell the stuff.

Now, isn't it clear to you that Fitzgerald, when he went up there, had a clear—well, I'll say a conviction in his own mind that he was a seller?

Let me tell you something else. There is something [264] a little bit fishy about this. And I have tried to figure it out. And the only answer to it is this—I can't think of any other: How did it happen that two narcotic officers, Mandel Schein and O'Brien, went up there to search, and they were searching around, couldn't find, and then telephoned for Fitzgerald? How did it happen? I asked Fitzgerald, "Did you know they were going up there to search?" He said, "No." Why would they call Fitzgerald? He's a better searcher? They are narcotics men. Why did they call him? And how is it that Fitzgerald in a few moments went to the top of the closet and found the narcotics? Try to figure that out. Why do you figure that was?

I'll tell you: my opinion is that Fitzgerald told them to go up there. Somebody told him this fellow sells it. So Fitzgerald was convinced he sells it. If he is convinced, why do they have to trouble their conscience? Then this fellow begins to appear as an idiot, which he is not. He must recognize that a man who is engaged in crime—unless he is just a drunken bum—tries to keep out of the clutches of the law. So you must give the defendant the benefit of having a little shrewdness. Is he going to make those admissions, almost bare his soul to them? "Yes, sure, I'm a bigger criminal than the evidence indicates." No. They are convinced. They were both convinced [265] that he was a seller. They got that from hearsay. It has got to be hearsay. And that doesn't mean anything.

So I say that both Fitzgerald and O'Brien are not to be believed in this case, and I am saying that seriously. And I am not saying that in another case O'Brien might not testify to the truth. I say here he did not testify to the truth. It wasn't necessary. It was so perfectly simple, it wasn't necessary to bother about scruples. The defendant is a seller. In his own mind, he is a seller; therefore he is guilty. I say that you must reject their testimony if you subject it to the tests that I suggest, and not say "Well, why should we brand him as being a liar, as one who colors the truth or didn't tell the whole truth."

I remember asking some of the gentlemen who came into the box whether they would be embarrassed if they had to decide that the officer was not telling the truth, and the answer was "no." And they shouldn't be. But I say to you, analyze that testimony and see if you don't reach that conclusion, if you must not reach that conclusion, because it is too childish. It is an appeal to naive people—it is too childish, really, to believe that this defendant made those admissions under those circumstances that existed at that time and that place.

Then he had to throw in "Help yourself. There is seven hundred dollars. Help yourself to it." Well, you see, that's [266] color! That's color! Another indication that the defendant is a seller of narcotics! They caught him with the goods; he is an experienced hand: "Help yourself."

Well, the girl explained that. Sure he had a lot of money. Well, his sister-in-law testified for a few minutes on the witness stand. And if it weren't so, that she had not withdrawn the money from the bank a few days before, it would have been proved to the contrary. So that you can take as gospel. That, I say, is thrown in as color: "Help yourself to the money."

As a matter of fact, if he said that, and to make the case stronger, the cop would charge him with attempted bribery, because that is what it is: attempted bribery, to offer a cop money to desist from doing his duty. There is no such charge. There is nothing like that in the complaint.

Now, did the defendant intend to sell? Did he intend to sell? That is the ultimate issue in this case. He had the staples, he had the envelopes, he had capsules, he said he was a user, a big user. He has got fifty days' supply. He figured this man wouldn't be around for some time. O.K. Well, is that true or isn't it true? Are you going to say to yourselves, "Well, what did he need the envelopes?" He says, "I used it to sniff outside." "What did you need the capsules?" "Sometimes when I would go to a public place, like a dance, I would naturally go to places where policemen [267] would make raids. And it would be easier to dispose of the capsules in such places." But when he went alone, or to places where he did not fear a search, he used an envelope with the heroin in it, and he stapled it so it wouldn't spill.

All right, the officer says there is a pattern, a pattern. Those who sell narcotics have this stuff, he says. Well, these things can fit many patterns. Each of us probably has a stapler. Envelopes? I have seen those envelopes, and you have seen them, in various places. And so it does not necessarily follow that they are for narcotics, or that every narcotic user uses that type of envelope.

Mr. Lappano says the reason they use it is because you can see there is powder through it and not sand. I think he slipped there. That is really ridiculous; because when a man buys heroin from a dope peddler, you can fill that with flour, or some other powder, so far as that is concerned, to look like narcotics. The reason they use the envelope isn't for that. And you can believe me—I say "believe me"—I mean you can take it for granted that there is no such pattern. I would bet my last dollar that there are plenty of narcotic sellers who use brown envelopes, who use buff-colored envelopes, and different kinds of envelopes. It's ridiculous!

Now, the stapling machine: sure there are narcotic [268] sellers who use it. And yet I would dare say there are narcotic sellers who don't use it.

If a narcotic seller is measuring, and he wants to weigh out something, he uses a scale. But don't tell me that every narcotic seller uses a scale. He has got those little capsules, and they come in different sizes. You can sell them that way.

All that may be true. It may be that there are narcotic sellers, and a great many of them, who use staples, envelopes, scales. So what? They've got to establish beyond a reasonable doubt that this defendant had those narcotics for sale: that means he sold it. If this defendant were selling narcotics, and they knew it—and O'Brien said, "I went to the station house with him and told him 'I know who you sell to' ", do you mean to tell me he couldn't get him on an actual sale? He knew to whom he sold. You know, all you have to do, you observe two people. And I have seen this in court, and I have heard it. A police officer will see one man pass an envelope to another, and then he'll search the second man. And he even testifies—I have heard them testify—that he has seen the man who got the envelope pass money to the first man.

And then they examined the envelope, and they found it was a narcotic. And there was evidence of a sale. And that has been done many times. But he is telling the defendant, "I know to whom you sold."

[269] Do you mean to tell me that if he was a seller they couldn't have had some evidence of a sale? Wouldn't they have testified to some real efforts made to detect him as a seller? Who made any efforts to detect him as a seller? So it's much easier—I said to you at the beginning, a lazy man's statute. You know, there are many prosecutors—from time to time, when they have trouble with their work, they are always running to the Legislature and they are asking for new laws. They can't enforce the law. And for years I have maintained it's because they're lazy. Of course it is hard to enforce all laws. But there are a lot of prosecutors who are impatient, they can't wait, they can't lay out a plan, project their minds ahead, and work hard day and night, never losing sight of their ultimate objective. It's easier, it's much easier, to arrest a man with a stapler, with envelopes, with a scale, get an admission from him, and say, "Well, that's as good as a sale. Why do I have to break my neck getting him selling this stuff?" Mind you, they are both the same crime: possessing with intent to sell and selling: the same type of crime; both felonies; the same type of felonies. So I say to you: they find this stuff, and they never got him in a sale; they say he intended to sell it.

Now, even there: take all this stuff (indicating exhibits). It looks bad. He's a user, he said. "The envelopes [270] I use because I sniff outside."

Incidentally, Mr. Lappano called the doctor—I guess for the purpose of showing he is not a user. The man proved nothing, because he said "I did not examine his nostrils", but he didn't find any puncture marks. Well, the defendant hadn't used a needle, I understand, for some time before that. But at any rate, there was no testimony as to how long the marks remain on the arm after you use it, so that doctor proved nothing.

But coming back, he has got the stapler, the envelopes, the scale, the milk sugar. Well, the milk sugar is consistent with a user, anyhow. He mixes his own product. And you say

to yourself, "Well, maybe he used it; maybe he sold it." And you start arguing, and thinking. You think hard. And then you say "How do I know he didn't use it, even though there are narcotic sellers who have that stuff? How do I know he didn't use it?"—I am putting myself in your position. I am trying to figure: "How do I know? How does Mr. Lappano know that he didn't use it?" Take it all; spread it out. We have the stapler, we have envelopes; we have staples; we have a scale; we have a jug of milk sugar. The defendant said, "I used the stuff myself." He explains what he did with the other things. The scale, he says, was a souvenir, or part of something else. "Anyway, I used the [271] stuff myself." How do you know he didn't use it? Because the policeman says there is a pattern of narcotic sellers using that type of thing, those types of things, those articles?

Do you realize that, in the final analysis, if he did not make those admissions, you are left with no case? And I tell you why. As a matter of fact, you are left with no case because you can go back and forth a hundred times, and you will have to ask yourselves, "How do we know? How do we know?" The cop said, "I assumed he was a seller because he had these things." Now, isn't that ridiculous? "I assumed he's a seller." You've got to go further. You've got to say, "I am convinced beyond a reasonable doubt that he's a seller. In other words, I am convinced to a moral certainty." You have got to say, "I am certain he is a seller." How do you know? How could you say you are certain he is a seller? Unless you believe—you believe!—the defendant admitted, with a full realization of what he was saying, he admitted, "Yes, I'm a seller", and he convicts himself! But if he did not make that admission—and I say that the evidence of that admission defies acceptance—it must defy acceptance, in the light of common sense, reason and probability,—not only is it an admission that "I am in the racket", but it is an admission that "I was in the racket", according to him, [272] "two years", according to another "four or five years." But I say that if you use your common sense, and reject the admission, then you've got a set of facts which is susceptible of two inferences: one, yes; one, no; one, he used those things to sell; one, he did not. And where you have that,

the law imposes a duty upon you to acquit him of that charge. Because where any set of facts is susceptible of two inferences, you must give the benefit of the doubt to the defendant. You must! That's our law: So when you really come down to it, the admissions, and those alone, would enable you to convict him in this case. And if you want to convict him on that, that's your business. I say to you that it would not be consonant with clear thinking, hard thinking, and analytical thinking, concerning the facts in this case—it would not be—if you accepted that. Because the admissions, to my way of thinking, as I see it, and as I analyze it, are gratuitous, and could not have been made, or given, because they were convinced he is a seller. Now, you must, therefore, confine yourself to the reasoning which I suggest to you: yes, he might be, and he might not be. When you begin doing that, you are yourselves saying "There is a reasonable doubt." And if there is a reasonable doubt, the Court will charge you that the defendant must get the benefit of it.

[273] Now, you can't reach a verdict—oh, well, this whole business: a possessor with intent to sell, or he is a seller—you can't reach that verdict, and leave here, and an hour later have compunctions after your verdict is given, and say, "I wonder if I was right." In other words, you should not do that. Because if you reach a verdict, and it's the type of conclusion which will enable you to say a day later, "I wonder if I was right; I wonder if that man was a seller", you have already indicated a reasonable doubt. I say that it was never intended to make it easy to convict anybody, because the Constitution could easily have provided that you can convict somebody on a preponderance of evidence, because that is not so. The law says you must convict a man only when where is evidence beyond a reasonable doubt. Isn't that evidence beyond a reasonable doubt? How do you know he was a seller? That's the point.

I say to you, convict; convict him of possessing the narcotics. Let his Honor send him to jail. But don't permit your common sense to desert you. And don't speculate. If there is a doubt here as to whether or not he intended to sell it, you must give the defendant the benefit of that doubt.

I want you to do your duty. I say, do your duty. I want you to be particularly careful, because I like justice [274] this

way. I like to see a miserable, anti-social human being, sitting in an American courtroom and receiving the consideration he receives.

I told you before something about the study of history. And nothing is more heartening to me, nothing convinces me more of the sturdiness of our institutions, than does a scene like this. And nothing will convince me more than if you ladies and gentlemen take this case with, I say, a solemnity, because you have a great duty to perform. Find him guilty. Find him guilty of possessing the narcotic drug. But don't let yourselves be stampeded, or in any way diverted, from your path of analyzing facts and circumstances very carefully. And keep in mind what I told you. Once you have reached that speculative part of the case, once you have reached that point where you must speculate, then you must acquit him of that. But find him guilty of possessing.

Thank you [concluding at 11:15 a.m.].

(Thereupon, Mr. Lappano summed up the evidence to the jurors, on behalf of the People, as follows:)

## Closing Statement for People

Mr. Lappano. May it please, your Honor, Mr. Gelb, Mr. Foreman and ladies and gentlemen of the jury: First, may I thank you for the apparent interest that you have shown, and the patience with which you have listened to the testimony [275] in this case. It hasn't been a very long case. And I trust that it is a case that appears to be clear, without any confusion about it.

As I sat and listened with the utmost of interest to what my old friend, Mr. Gelb, was saying to you in summation, I could not help but think of the days when he was an Assistant District Attorney for many, many years, rising to the position of the Acting District Attorney at times; and how he, with all the power at his command, would go before the various juries in our court and speak gallantly and fine about police officers who were telling juries that they had gotten admissions.

Now, the picture has changed. He is no longer an Assistant District Attorney. He represents this most miserable, contemptible, lowest type of criminal that this community has.

What we have here is a dangerous, horrible criminal—horrible because, if you will only bear in mind that if what was testified to here is accepted by you as true, and that this man possessed this large quantity of narcotic drug in order that it may be peddled, that it may get into the hands of our citizens of this community who, by using these drugs, are subjected to a slow, consuming death, then you know the type of criminal that we're dealing with.

So that we have that type of a criminal, represented [276] by one of the most able lawyers I know in this community: smart, seasoned, clever, eloquent Mr. Gelb. That really is your problem, as I see it: not the defendant. It's this experienced lawyer that he has seen fit to engage; and he is entitled to have him. That is the problem that you will have: the eloquence that has been thrown at you by Mr. Gelb, not the case itself, as you will see when you retire.

I hope you will not be affected by the eloquence of counsel, but you will concern yourselves only with the evidence, which you, under your oath, are supposed to do. You are not supposed to decide a case upon what I say to you, nor what Mr. Gelb says to you. Those are arguments that you may accept or you may reject, depending upon whether you believe they have basis or no basis at all. But ultimately, the oath which you took says that you will a true verdict render according to the evidence; not according to what I say is evidence, or according to what Mr. Gelb says is evidence, but according to what you say is evidence that you see fit to believe.

If I did not have as my adversary Mr. Gelb, and he had not made the type of summation that he made to you, I would almost be willing to say not a word in summation to you, but say instead, "The case has been a short one. You have heard [277] all the witnesses. When I accepted you as jurors, I accepted you because I thought you had the common sense and the ability to pass upon this evidence. Go ahead: do your duty according to the evidence, without any argument from me at all." That's how clear this case appears to me to be; except for the

confusion which might be created in the type of summation which Mr. Gelb was capable of making to you.

I told you from the beginning that what you had to watch out for in this case was an attempt would be made to get away from the grave and more serious crime of possessing drugs with intent to sell, and get you to find him guilty of merely possessing the narcotic drug. And you see that what I suggested that you watch for has been unfolded clearly beyond any question, because when he finished he said, "I want you to find him guilty of the second count, possession of narcotics." But, Mr. Foreman and ladies and gentlemen of the jury, this man not only possessed narcotics, but he possessed them for the deliberate purpose of selling these narcotics. And I'll tell you why as we go along.

This is an important case. All the cases that we try in this great Court of General Sessions are important: important to the defendant, of course; but important to the people of this community. I dont know of any case, [278] short of murder, that is a more serious type of case than the one we're trying here. I may even say that I think, myself, personally, that, considering the people who are addicted to the use of drugs by these peddlers of drugs are condemned to a slow living death, that is even worse than murder. So let's not look at this case other than as an important case, a very important case.

And, if you please, Mr. Foreman, for ten or fifteen or twenty minutes of the time that Mr. Gelb spoke to you, he was telling you about this grandiose system of ours, the importance of a jury, how sovereign you are, how no one can interfere with your verdict, and blowing you up, so to speak: a part of a clever advocate's business in summation. There is no need of that type of summation. We all know that the final judgment rests in your hands. What is the "business"? What is the reason for all this? Is it flattery? It is part of a plan, a design, to try to flatter you, and make you feel important, or more important? I don't know. But it's part of tactics and strategy in connection with the delivery of an address to a jury. I would rather spend my time, if you please, discussing with you the evidence, because I feel that in this type of case you will

do your duty, and you know the importance of your position in this jury. And I am going to talk about the evidence.

Talk about throwing dust in the jury's eyes! Talk about frankness! Talk about unfolding to you the criminal record [279] of this defendant! Now may I be permitted to tell you a thing or two: I don't think that Mr. Gelb gave you anything when he gave you that so-called frankness and disclosed the criminal record of the defendant. And I'll tell you why: he knew that, from the possession of this large quantity of drugs, and all of the circumstances, that his defendant under these circumstances would have to take the stand and have to give some kind of an explanation. He knew that in advance. And he knew that once he would take the stand,—the defendant—then he knew that the District Attorney could bring out, and would bring out; all of his criminal record. So, knowing that, cleverly anticipating that, cleverly he tells it to you so that when it does comes out the blow of the information coming out would have been softened. But he knew that was going to come out. That's why he told it to you in advance; so that then he could come and say he was frank about it, he was frank about it, he let you in on it. He let you in on it because he knew it was going to come out, and it had to come out. Don't fall for this "frankness" stuff. In this situation, you can see that that is the only reason why he told you that.

If he had a case where it would not be necessary to put the defendant on the stand, and he chose not to put the defendant on the stand, there would be no way that I could [280] bring out his prior criminal record—this defendant. And I think I am safe in saying that he wouldn't tell it to you if he didn't plan to put the defendant on the stand. Mr. Gelb would not tell you about his criminal record.

I trust you get that clear. Knowing he was going to put the defendant on the stand, and that this prior criminal record was going to come out,—a record that he made right in this Court of General Sessions in 1941 and 1942,—knowing that, what else could he do but anticipate it and tell you about it? He tries to make you think, in the way he talks to you, that he gave you something, by the so-called frankness, that he did not have to do; that he was letting you in on something that he didn't have

to. Not at all. He did that because he was forced to do it; because he intended to put the defendant on the stand, and once he did that, that all would come out.

Mr. Gelb has had his experience. So have I. I have been trying cases in this Court of General Sessions for the past fourteen years. It has been a pleasure to try this case with Mr. Gelb, but let's not kid anybody; let's not talk about not throwing dust in the eyes of jurors. If we are to be frank, let's be frank in fact, and not just give lip service to frankness.

Now, Mr. Gelb seems to have fallen into the very same [281] error that most lawyers who appear for defendants always fall into. And what is it? Whenever you have a case where the evidence is so strong that you really have no substantial argument to make, it's always a safe risk to take: attack the police. Attack the police! The police are liars! Don't believe the police! Oh, that's just as old as justice: attack the police; attack the police. Well, sometimes the attack is proper. Most of the time it's most improper. And in this case it's a sad, miserable attempt. And I'll tell you why.

If it be true that a trial is a search for the truth, then there ought to be some guides, some rules, for helping persons—jurors, I mean—to arrive at the truth. Now, in all the years that I have been trying cases, I have never found any magic formula that I could suggest to a jury as to how to find the truth. In all of my years of investigating, and preparing cases, I have never resolved any sure-fire method of finding the truth. But there are certain guiding principles, so to speak, that are pretty well accepted by average persons. And I am going to suggest those to you, and see how it strikes your judgment. Because in this case, like all cases, once you have come to the conclusion of which side the truth is on, then I think the rest pretty much follows along.

[282] Now, sometimes jurors are, by counsel, blown up by questions that are asked of them and by summations that are made. And sometimes it has affected some of the jurors, and they begin to feel a little bit blown-up over the complimentary remarks that are made to them; and somehow they seem to become transformed for a while into believing that they are any different than what they were before. Now, you appreci-

ate that it isn't the idea of our law that you should be any different, after you sit in that jury box, than you were before. You represent a cross-section of our community. For whatever you are and whoever you are. But we want you to be what you are, what you were. We want you to be the same common-sense person that you were before you came into this jury box. We don't want to change you at all. We want the benefit of the collective judgment of you different men and women. Therefore, we want the benefit of that common sense which you have, and which you used every day before you came into the Court. That is what we want you for. We want the benefit of that.

I believe one of the best rules I know for helping you to determine the truth is to ask yourselves, when any witness takes the stand: "If this witness had come to me before I met him in court, in connection with my business, [283] and I was talking to that witness, and as a result of my talking to him I was to make a decision on what he said, upon a matter of importance; if I were to make a decision on the word of that man on a matter of importance, would I make it? Would I take his word? Would I believe him, so that I could make that important decision?" Do I make myself plain: It is a simple test, isn't it.

Now, if you bear that test in mind, then you see that when we come to the testimony of the defendant you have a perfect right to know that he has been convicted of serious crime. And bear in mind that that is the only purpose for which the law permits that a jury be allowed to know anything about his prior criminal activity. It isn't the purpose of the law to permit his prior criminal activity to be the reason why you should find him guilty in this case. Not at all. The purpose of the law, in allowing you to know the previous criminal record of a witness, whether it is a defendant or any witness that might be called—it doesn't make any difference—is so that you ladies and gentlemen of the jury, who have got to pass on whether you will believe him or not,—so that you may know something about his background, so that you can determine for yourself how much you see fit to believe him.

[284] So that you have a perfect right in taking that little rule and saying to yourself, "Now, it has been shown to me here

that this man has been convicted of robbery; with two others he participated in a robbery of a liquor store." He said he didn't have a gun, but that doesn't make any difference: the other two men had a gun. A holdup, which he was convicted of! And because, at that time, of his age, he was given a suspended sentence and placed on probation by one of the Judges of this Court. He was placed on probation on December 19, 1941. And on March 24, 1942, three months—approximately three months—after that, he was in again. He told you about a burglary, where he and another broke into a flat, and later was caught with some of the proceeds of that burglary.

Then on cross-examination it was revealed that besides these convictions for crime, we have a man who, without compunction, and thinks nothing of it, he's organizing crapgames all over or wherever he could—cutting crapgames, meaning, as he explained, to take a part for conducting this gambling activity. Then he tells you, as if that's another medal on his chest, that he also was a policy-collector.

Now, with that background, you have a perfect right [285] have you not, to say, "Well, I don't know if I would ever make any important decision on the word of a man of that type, with that kind of a background." And I say that would be a fair guide to help you decide whether or not this defendant is a truthful person, or one that is capable even of telling the truth. I submit to you, and I do this very respectfully, that his word is wholly and completely unworthy of any belief at all.

The police officers: Detective O'Brien—look how easily Mr. Gelb throws at him the crown of a liar, and all the thorns that such a crown has—to a fine, decent police officer. We have some of those. Believe me, we have some of those. We have the other kind too, but we have some pretty fine police officers in this community, who are performing a good job, performing it very often at the risk of their own lives. We have good policemen, and there is one of them—engaged in one of the most difficult tasks that a policeman could be assigned to: the discovery of narcotics and narcotic peddlers, purveyors, sellers of narcotics. Do you think that's an easy assignment? I tell you that that's one of the toughest that there is, with all of the risks that are involved in it.

Mr. Gelb would have you think that when Detective [286] Schein, who unfortunately is in the hospital as you were told, and could not be here,—he's still in the hospital—but when Schein and O'Brien entered this apartment, according to Mr. Gelb's presentation of the case in summation, to make it appear as he has been trying throughout the trial for that matter,—that as soon as these officers walked in there, right away this defendant began talking and admitting things. That isn't so at all. If you followed the testimony, you will recall that when Schein and O'Brien came into that room, and they made known to the defendant that they were there to search because they had been told he had a gun and that he also had narcotics, he said "No, they gave you a bum steer", or words to that effect? You recall that testimony? "A bum steer. You got wrong information. Wrong information. No, nothing doing! Nothing doing!" Well, we're going to search anyhow. If you have it, you better tell us." "No. No. No. No." "All right." And they began to look around.

Now you'll see how this thing is developing. Now, he knows, of course, that there are drugs there, but he said "No."

So the first thing that's found is an appreciable amount of money, later found to be seven hundred dollars. According to the officer's testimony, it was in a drawer. [287] And when the officer saw that amount of money, I think you can understand how he would become pretty much confirmed that he was on the right track here. Seven hundred dollars, or a bundle of money there, especially when this defendant says to him, "Why don't you help yourself? Christmas is coming." That isn't a bribe, and don't be fooled by that. He is smarter than you think, this fellow. He is now trying to get the detectives off his tail. And he's talking—as they say in the vernacular, he's trying to "talk business" with the detectives. That is the kind of a cop that will be on the force for fifty years, and all he will have at the end of his fifty years is his salary. We have that kind of officials, believe it or not, who are never thrown off the path of their sworn duty, no matter how much money is offered to them. Of those you don't hear, because that is expected of them. You only hear of those that go off the path. But we

have plenty of them. If we didn't have that type, you wouldn't have order at all.

But O'Brien now knows, pretty darned sure, that there is stuff in that apartment, when this defendant is trying to "do business": "take the money: Christmas." There is no admission of a thing by him up to now. But he knows what may come: that they may find this stuff.

And then they come to this drawer, where the envelopes, [288] the stapling machine, the staples, the scale and the empty capsules are found. Then what would you think? What would you think when you find that paraphernalia there? Are you on the right track, or aren't you on the right track? You know that capsules are used to put drugs in; you know that those envelopes are the kind that are used for putting drugs in them; you know that staples and stapling machines are used also in connection with that. And you know that a scale is used also. And there they are, all in the one drawer. In the possession of who? In the possession of a man who they have good reason to believe, and as Mr. Gelb saw fit to have brought out, is an international character as far as drugs are concerned. So they know they're on the right track. They know that the Federal people are concerned with this individual. They haven't found the drugs. "Let's call the Federal people in. They're interested in this fellow. They might help us, to search and question him, and everything else."

In goes the call. In a little while, Fitzgerald arrives, with this other chap. Fitzgerald knows him. He had observed him. But it doesn't mean that Mr. Fitzgerald's assignment was to cover him. He has other duties—plenty of them. He works under orders, although Mr. Gelb would make you think that all he has to do is follow Angelet because he is known or suspected of being an international [289] character in narcotics. Well, that isn't the way it is done at all. They bide their time. When the time comes, they act. And it doesn't happen as often as it should.

So in comes Fitzgerald, and he starts looking around. And he finds this mug or jug with the milk sugar. He hands it over to O'Brien. And Angelet is asked about it. And he said that he used it to adulterate or cut the drug.

Now, Mr. Gelb made a great point of what Fitzgerald said about that and what O'Brien said about that: that this was found before the drugs were found; that it's incredible, unbelievable, that the defendant would have said that he was using it—that is, in the present tense—that he was using it then to cut drugs. Well, now, O'Brien told you that when he found the scale and the capsules and the stapling machine and those other things, before this mug was found by Fitzgerald, this defendant, knowing that he had to make some explanation—although he didn't have to, he did. Under the circumstances, the natural thing—you have got to say something about it. Well, what do you? He knows perfectly well that these capsules, 104 of them, in this little envelope are for drugs. So he says, "Oh, well, I had those from when I was in the racket; but I am not in it now." And he stuck to that explanation when each of these items were shown [290] to him: "I used it when I was in the racket." He is still hoping that they will never find the drugs. So far he is on pretty safe ground, because it is no crime to possess envelopes, in and by themselves; it is no crime to possess empty capsules; it is no crime to have a scale by itself. So he is still on pretty safe ground, and he is hoping and praying that they will never find the drugs.

So when Fitzgerald finds the mug with the powdered sugar, according to O'Brien he said. "Well, it's the same thing. I used it", meaning the same thing as the scale and the others,—"I used it when I was in the racket." And Fitzgerald said "I used it". He said to O'Brien, according to O'Brien's testimony, "I used it the same as the other. I used it when I was in the racket." Fitzgerald did say that he said that the defendant said, "I use it in cutting down the drugs." Now, that is splitting hairs. That's all that amounts to.

Of course, they hadn't found the drugs yet, and that's all that it meant. It meant the same thing: that he used it when he was in the racket; "I use it". They hadn't found the drugs; and Mr. Gelb, quite properly,—I am not finding any fault with that; but he sees this little opening, and he jumps through it, and he goes in at length and at length to make a great deal out of it. [291] It means nothing at all. It means the same thing, because up to that time there had been no drugs found, and

what the defendant said at that time about this powder was, in essence, in substance, "the same as the other things that I have had there: I used it when I was in the racket."

And the search goes on. And, fortunately, Fitzgerald locates the drugs. And then you have the presentation of it, one package at a time. First the defendant says, "Well, you got it." He tells what it is. One package is an ounce, the other is an ounce, the other is about a half an ounce, the capsules are 18 cocaine capsules.

The officers asked, "Are you hooked?", meaning "Do you use the drugs?" "No. What do you think? I'm crazy?" That's the right answer, the right answer. I'll tell you why: Two ounces or more is a sizeable quantity. That's a quantity that is not generally possessed by users. Users have capsules: grains, a grain and a half. And he could not be in that business on that scale if he were a user. No, sir! Nobody would trust him. The higher-ups that deal with him, and distribute to him these large quantities, wouldn't do business with a user himself on the scale. All he would be able to get were the capsules, the one-an-a-half or one-grain capsules, as a user to satisfy his great need. A user, an addict, is an irresponsible unfortunate, [292] not dependable at all, and could not possibly be in the business, on the scale, of a narcotic dealer. That's the common sense of the situation. And when he answered, "What do you think? I'm crazy?", meaning that he was not a user, he was telling the truth. He was not a user.

On the stand here, the defendant would have you believe that he was a user. Well, that's consistent with this story that he is trying to sell you, this bill of goods that he is trying to sell you, through his worthy counsel. He says, "I'm guilty of possession; but don't make me a dealer." Well, we say he was in possession for the purpose of selling it, because everything indicates and is proving overwhelmingly that it was so. But, to be consistent, he goes on the stand, puts his hand on the Bible, and swears to this story: that he's out of the hospital—1948 he went in—and at first I thought he had been in for a year, if you recall. He was in a long time. But then it comes out: he was only in a couple of months; that he was hurt—there is no question about it. So he was out a couple of months.

Before that he had been setting up these games, policy-collecting, and so forth. And now he is out after a couple of months, and he is taking drugs. He said he was taking it before too. He is going to put [293] it on thick, now. He wants you to believe him. His business now is selling you this bill of goods that he is a user. Oh, what a user! "I got to have it every day! If I don't get it, I'm suffering! Why, that very morning of that arrest I had to have it!" He has been buying this stuff on the 17th, 15th, 14th, he has to have it! He has to have it! He has got to have it!

Lo and behold! When he is taken into the station house, according to the rules that are required, that the police officer shall inform the desk officer whether the man is or is not a user, in order that the lieutenant or desk officer who is making the entry, who signs these entries when the booking is done, in order that that man shall know—and I'll tell you why it's important that he shall know—the officer, under regulations, is required, no matter how many times the defendant had told him before, he is required in the presence of the desk officer to ask him so that the desk officer may hear, "Are you a user?" And again he says, "No." And the desk officer puts down "No." And that is the point in having that book down here, that it showed that the entry was made "No" under the circumstances.

Now, why was that required. You may be interested. When they have a drug addict, a person who is in need of [294] drugs, he can become quite a problem in the station house. What they go through when they are without the drug is a most pitiful thing. They're in agony! They have cramps, and they are yelling, and they're crying, and they want this stuff. They have got to have it! To them it's the end of the world unless they have it. And that police officer wants to know, and, under the rules and regulations, must know, whether the person is a user. Because if he is a user, he is alerted to the problem which he may have to face during the time that he stays there in the station house, before they take him to the court the next day; so that, if they have to call an ambulance, they'll be ready to do so, and they'll know that he is not faking, because, he is, from the beginning, admitted to be a user. That

is in accordance with regulations; and its in accordance also with humanitarian consideration for a person who unfortunately is a user.

So that he said he was not a user. And that was not the first time. He said it at the house.

And when it comes to prison here, he's examined by the doctor that testified here late yesterday, as he examines forty, fifty or sixty of them, or seventy of them, at a time. In a two-hour period he goes through—it is a very rapid examination. He looks them over. If there [295] is any signs of injury, or "How do you feel?", or "Are you a user of drugs?" He said "No". Consistent all along. Not a user of drugs. He examined him four times—three or four times—four times. Am I right, Mr. Gelb?

Mr. GELB. Right.

Mr. LAPPANO. [Continuing.] Four times in this month or so. At no time did he find any evidence of any need for drugs—no symptoms that he was a drug user, no request for drugs, no sign at all. If this man were a drug user, as he is trying to sell you this idea, why, within a few hours after he would be in the City Prison there, even if they wouldn't give him any drugs, he would make known, by signs of his condition, his physical condition—he would be crying, he would be demanding fulfillment——

Mr. GELB. If your Honor please, I haven't interrupted this summation up to now. There is no evidence here as to any such reactions on the part of users. There is no evidence in the record.

Mr. LAPPANO. [Continuing.] The defendant himself testified that when he did not have the stuff there, he would have pains, and he would want it.

Mr. GELB. There is no evidence in the record as to this last statement that Mr. Lappano made.

Mr. LAPPANO. I am arguing now to refute the argument—— [296] Mr. GELB. That's all right. I am just saying there is no evidence in the record.

Mr. LAPPANO. I know there isn't any evidence in the record——

Mr. GELB. All right. Go ahead.

Mr. LAPPANO. [Continuing.] I am saying that when he went to the Tombs, if it be true that he was a user he would naturally demand or show signs of being a user. This great need that he had that morning, as he is trying to tell you, on the morning of the arrest that he had to take the stuff, he had to have it—if he didn't have it, it would affect him so that he would have cramps—you heard him testify: he had to have it—had vanished completely. And at no time since December 21st did he ever ask for drugs, or was there ever any sign that he was in need of any drugs. None at all! And when asked by the doctor in the Tombs, "Do you use drugs?" he told that doctor, "No."

I say to you that this story about being a drug-user is a lie; it's a fabrication, designed, calculated, invented for the purpose of escaping the major crime of this indictment, namely, that he possessed these drugs with the intention of sell them. He wants to escape conviction on that first count; and it's only because of that that he has fabricated that. And I think it's clear that [297] it is a fabrication.

Now let's take this heroin, and let's do a little arithmetic, as bearing upon the possibilities of the story that the defendant is giving you, as to how he possessed them and why he possessed this quantity.

You were told by the chemist that there are 437 grains to an ounce. You were told by the officer, on cross-examination of Mr. Gelb, that one-grain or one-and-a-half grain capsule—you remember, he was trying to find out from him how much pure heroin is usually found in a capsule. And the officer told you that it varied, depending upon the locality: in some places they are selling those heroin capsules that have very little heroin in it, even as little as one-tenth of one per cent, or one per cent, or two per cent., or three per cent., or four per cent. He gave you as his experience that the average is between three and five per cent. Now, that means that in a capsule that contains five per cent. pure heroin, the other ninety-five per cent. is made up of this white powder. It is not a drug: milk sugar. And Mr. Gelb wanted to know if there was a market—what was the market, what do they sell it for? And the officer said, "I think it is about a dollar or a dollar and a half per capsule.

Now, just so that I wouldn't make this too involved, suppose we take the high figure of five per cent. heroin [298] per capsule of one grain. Five per cent., not one per cent., nor one-tenth of one per cent., but five per cent! By simple mathematical calculation, this is what we get. There are 437 grains to each ounce. Remember, this stuff that we had here in two packages, each of one ounce, was thirty per cent. pure heroin. So there are 437 grains to an ounce. So you have two ounces and about one-quarter that are involved. The one-quarter ounce, however, is not as strong as the other two. That is only eighteen per cent. pure. But the large packages, each of them about an ounce, are thirty per cent. pure. So two ounces would have 874 grains, thirty per cent. stuff. Now, you can cut that with this milk sugar to whatever a peddler's or a seller's traffic requires. He can do with it whatever he pleases. He could make it into one per cent. stuff, two per cent., four per cent., five per cent., ten per cent., anything he wants. Of course, the less pure heroin you put in, the less expensive it is. So, 874 grains. Let's take a good, strong capsule, with five per cent. heroin. And this is thirty per cent. stuff that he had in his possession. That means you can cut that down and make six times the quantity, by simple arithmetic. Is that right? Thirty. Divide that by five, equals six. So you multiply 874 grains, which is the total for two ounces, by six. And my calculation shows it's 5,244 capsules of one grain with five per cent. heroin. Five thousand, two hundred and forty-four!

[299] Then we have the approximately one-quarter ounce of eighteen per cent. stuff that was found there. That would be about 109 grains. One-quarter of an ounce: one-quarter of 437 is about 109 grains. I figured it out by first multiplying 109 by 18, you could make 1,572 capsules of one per cent. stuff—of one per cent. stuff. But by making it five per cent. as we did the others, we would get an addition 530 capsules of five per cent. heroin in that quarter of an ounce.

So a total you have of five per cent. heroin in one-grain capsules that could be made up, totalling 5,774. And that's five per cent. And if you wanted to, you could cut that down. And if you cut it down to one per cent., you would have five times as much, or about 28,000 capsules of one per cent. stuff.

Now, that's the quantity that this defendant had! What are we dealing with here? Who is trying to kid you?

Another thing: if he be a user, he would want this stuff not as weak as he could make it but as strong as he could make it. That's pure, simple common sense. If he had gotten eighty per cent. stuff, as he says, the night before from the seaman for one hundred dollars, why does he cut it? Why does he reduce it to thirty per cent., making out of a half ounce these two and a quarter ounces? Why? Why didn't he keep it intact? Eighty per cent. stuff [300] is, naturally, good stuff. And if you have got to have it, and you need the stuff, and you have the money—and apparently he had the money: according to his story, he had eighty per cent. stuff—that is the stuff he would need to satisfy his craving.

Sure these staples and this stapling machine, and all these things, taken separately, are perfectly legitimate things to possess. No one can get away from that. But when they are possessed at a time, and in a place, and under circumstances from which anyone can see that the intent to possess them is not for a legitimate purpose but for an unlawful purpose, then you have a different situation.

The scale—I think I pointed out; I don't know whether you saw it, but the scale looks like it has had some sort of activity. You see, at the top of that little ring [indicating]—I tried to point it out there—there is something—what appears to be be some Scotch tape, or some substance, around it. See? [Indicating.] Do you notice that? Right at the top of that little ring. You can look at it [handing exhibit to the jurors]. You can look at it. Now, I don't know just how he uses that stuff, but that gives me a little thought that probably when he was measuring this drug, instead of holding it in his hand by that little ringlet there, he probably had a [301] piece of Scotch tape, which I understand these days the ladies use for almost everything and anything—you can just tack it on to the side of a drawer, or place there, where the scale would hang by itself: you wouldn't have to hold it: just stick it on the side of a drawer there, and then the thing would hang, and you could put your envelopes in there. There is a little clip there. I will show you how it works as soon as I can get it back. Now,

I don't know; I may be all wrong. I am just discussing it; but it seems that that might be the reason for that being there.

(The jurors return the scale to Mr. Lappano).

This scale is very simple [illustrating]. It is a two-ounce scale. Of course, it is also used for weighing less, up to two ounces. All you do is open that clip, and then you have it—the weight, you see, this is little over an ounce [indicating], because you have now this brown—see how it registers? See? [Illustrating to jurors.] There you are! And it's graduated. So that you can get a half ounce; you can get even a portion of a half ounce,—all those little graduations there.

Well, I don't want to take too much more time, but I would like to answer one or two more remarks that Mr. Gelb made. He says the police officers could not get him on an actual sale. "Couldn't they get him on an actual sale [302] instead of this possession with intent to sell?" Well, if they could have, they would have. They did not get him in an actual sale. He is a bit too smart, much smarter than he might even appear. This tracking down of this class of seller is not easy. If we're right that this fellow, this defendant, is in the upper brackets of the business of selling drugs, he doesn't sell to the fellow that needs: he sells to the distributors below him. The police never come in contact with him. He's a big shot. He would sell to those that go around selling it to the actual user. In any particular territory there may be any number of people that are glad to go to Mr. Angelet's home, let's say, and buy from him so many capsules. Those are trusted people. They are not police officers. The police never can get in there. Once in a while they succeed, after long and patient work, but not very often. And those fellows go around in the streets and supply the customers. When they finish, they go back to him and get it to go again peddling. He is a source. And above him there are bigger people, who supply in quantity load. So when Mr. Gelb asked a question, "Couldn't they get him on an actual sale?" I say to you, I don't believe it's possible to get him making a sale to a user. This fellow would sell his stuff, or give his stuff, to his agents, who go out on the streets and peddle it to the actual user.

[303] Now, the saddest part of the summation—and I say this respectfully—was when Mr. Gelb not only found fault with the officers, who he sees fit, for the sake of the cause that he espouses—that is, the defendant—sees fit to call these fine police officers "liars"; but he goes beyond that. He finds fault with the "lazy District Attorneys" who go running to the Legislature to get laws passed to make it easier for them to get convictions. Well, that's sad, really. Isn't it too bad that there should be progress insofar as the law is concerned! And that District Attorneys who, out of experience, make their recommendations to the Legislature, and have their recommendations adopted as proper—and bear in mind, the Legislature—talking about democracy, and the system that Mr. Gelb saw fit to talk about for fifteen or twenty minutes—that Legislature is made up of members that you and I voluntarily select and elect. They are our representatives. And they see fit to enact into law the recommendations that are made to them, whether it be by District Attorneys, or Judges, or other law-investigating agencies. Isn't it too bad that Mr. Gelb should find fault with these so-called "lazy District Attorneys"? Maybe it's about time that the community, through their representatives in Albany, took note of the disadvantage to which the community as a whole has been with respect to certain types of crim-[304]inal activity; and that for the protection of the community against that criminal activity they pass laws that are intended to aid in the elimination or the suppression of that activity, in order that you, and I, and the community may better live, under better legal conditions and orderly conditions.

So, here, the Legislature has seen fit to pass a law that makes—now, mind you, this is all separate and apart from the case that we had. Because I submit we have established this case beyond any reasonable doubt at all, that this defendant possessed this stuff under circumstances clearly showing that he possessed them with intent to sell them: not only the circumstances under which it was found, but the discussion that was had with him by the officers—his own statements. Because there was nothing he could do when the stuff was actually found, in view of the story he had been telling up until that time, but open up and own up. He probably still figured that he might

be able to "do business" with these fellows: who knows? But anyhow, the point is that aside from this law I am about to talk to you about, and Mr. Gelb saw fit to talk about, this case is clear: admissions he had them for the purpose of sale; that he had been in the racket. The quantity speaks for itself. I call these [indicating [305] exhibits] "silent witnesses". Every one of these exhibits, taken together, these are silent witnesses that speak louder than all the words you can possibly command. Take them all together, under all of the circumstances, the case is established beyond any—and I saw this most respectfully, of course—reasonable doubt whatever.

But the Legislature has seen fit to pass a law in connection with this narcotic traffic. In other words, the Legislature has awakened to the horrors of this traffic, and has enacted this law as an aid to the better enforcement of the law against narcotic-sellers, as an aid to the better protection of our community from the devastating effects of this horrible traffic in this horrible drug. And it said, as a separate part of the statute, that such intent—that is, intent to sell—when a person is found to have in his possession a quantity of drugs,— it says, "such intent is presumptively established by proof that the person knowingly possessed or had under his control a total of two or more ounces of one or more of said preparations, compounds or mixtures containing three per cent. or more of the respective alkaloids." Three per centum or more, including heroin.

In other words, the Legislature says that whenever a person is found to be in possession, knowingly in possession, [306] of a drug of this type that we have here, and that its potency is three per cent. or more—and here it's thirty per cent.— and it is over two ounces—and I am only talking now of the heroin, because the cocaine doesn't figure into it at all for this purpose here—I mean on the two ounces or more, because on the cocaine there was no analysis made by the chemist as to how much of it was pure. But sticking only to that which has to do with the heroin, and which was analyzed completely as to weight and the percentage of the heroin in it, we have more than two ounces—that is about two and a quarter ounces—of heroin, a prohibited drug that comes within this section, of more than three per cent.— we have here thirty per cent.—and

this law says that, under those circumstances, a person possessing it is presumed to possess it with an intent to sell it.

Now, we all understand, too, that such a presumption does not have to be accepted by a jury. I still have to prove my case. But I think Mr. Gelb was wrong when he said that the law is that where you have "Did he or didn't he possess it with intent to sell?" that if you have such a doubt you must acquit the defendant. This law, as I understand it—and maybe I shouldn't get into that field at all, Your Honor, because I think that is [307] your province exclusively, but Mr. Gelb saw fit to talk about it. And if I am wrong, I want to be stopped——

Mr. GELB. I did not talk about the presumption. I said "a reasonable doubt."

Mr. LAPPANO. But you went further. I want to finish——

The COURT. Please, gentlemen, let us go ahead. It is 12:25.

Mr. GELB. All right.

Mr. LAPPANO. This law, as I conceive it—and his Honor will be the final word on that—that in just such a situation, where you might have doubt——

Mr. GELB. Now, your Honor, I move to strike that out. That is error; because the presumption has nothing to do——

The COURT. Objection sustained. I will explain the law on that subject.

Mr. LAPPANO. All right. Maybe that's the best thing to do, is to let the Judge give the law. It is always dangerous for lawyers, whether it is District Attorneys or defense counsel, to get into that field and tell the jury what the law is and what they must do. Now, please, I have deliberately avoided going into that, and I wouldn't have even undertaken to refer to this, except for the fact that Mr. Gelb saw fit, in the course of this long lecture he gave you, to give you this point of law. But I am going [308] to leave it to the Judge. Don't you listen to what Mr. Gelb said about the law; don't you listen to me what I said about the law; but do listen to his Honor. He'll tell you what the law is.

I'm finished with these remarks now. Truly, you are in a most important position; because, as I see it, the jury system is the corner-stone, or the keystone, if you please, of the entire edifice of the enforcement of our criminal law. Without you

in this picture here, we would be nowhere. The police can do the swellest job that citizens can possibly expect, and the arrests can be made, and the District Attorney can prepare, and the Grand Jury will do their job; and then we go; and the Judge helps and presides over a trial here, of selecting the jury, and acts as a referee, and seeing to it that every defendant gets a fair trial, and all of that; that the community gets a fair trial. When it's all finished, it goes to you. You're the final word in this whole thing. And I say just, simply, this: to the extent that a jury intelligently, courageously and faithfully performs and discharges its duty, and in a case where the guilt of the one is established beyond any reasonable doubt, if they fail to perform their sworn duty and bring in a verdict courageously and properly, if they fail, to that extent the criminal law enforcement is broken down, and to that extent the community is unprotect-[309]ed. And, take the reverse: to the extent that jurors do have the courage of their convictions, and are not misled by oratory and eloquence and so forth, but stick right to the evidence, as they should under their oath, and come out with courage and conviction, and say, where a case has been established, that they are guilty, "they are guilty", without consideration of any kind, sympathy, leaving the matter of sentence entirely up to his Honor, where it belongs, to that extent the community is protected, and no one could ask any more of any twelve men and women.

I feel that you will do your duty. I feel you will not be fooled by this brazen attempt on the part of this defendant to make it appear that he is a user, hoping to be convicted only of using, when in fact he possessed this stuff with the intent to sell it, that you'll bring in a verdict of possession of this drug with intention to sell it.

Thank you. [Concluding at 12:30 p.m.]

The COURT. Do you want a recess?

The JURORS. Yes.

The COURT. The jurors request a five minute recess. So I will dispose of the balance of the calendar during that time.

You are admonished not to discuss the case with each other, permit any one to talk to you about the case, nor re-[310] main in the presence of anyone discussing the case. You are further

admonished to keep your minds open, to form no conclusions as to the guilt or innocence of the defendant until the case is submitted to you.

(Trial resumed after short recess)

*The Court's Charge*

GOLDSTEIN, *J.*:

Members of the Jury: You have come to that part of the case where you are called upon to perform, and are now commanded by law to perform, one of the most important duties the State can ask or exact of its citizens. No higher civic duty can be asked of citizens than that of being called upon to serve as jurors in an issue involving the guilt or the innocence of a person accused of crime.

You have given close attention to the testimony of the witnesses in this case. Both sides have had an opportunity to examine and cross-examine each witness. Having heard the testimony, it will be necessary for you to deliberate and decide the facts. You should do that in accordance with your oaths.

If a defendant committed acts which constitute a crime under the laws of the State, the responsibility for the consequences which flow from those acts is that of the defendant and not yours. If you are not convinced beyond a reasonable doubt that a defendant committed the acts [311] with which he is charged, then there is no criminal responsibility on his part.

There are certain principles and rules of law applicable to this case with respect to which it is the Court's duty to instruct you; and it is your duty to follow the instructions of the Court, and to take the law applicable to the case as the Court gives it to you.

As I proceed with the charge you will note that certain principles of law are applicable to all cases, while others apply particularly to this case.

Let me at this point say this: I am going to do my utmost to make everything that I say as simple as I possibly can, so that all of you can understand it. On the other hand, should any juror not understand everything that I am saying, don't

be ashamed to talk up and ask me to explain it further; because I will never know whether I make myself one hunderd per cent clear to you on the charge unless you tell me so.

In coming to a determination as to the guilt or innocence of a defendant in a criminal case there is always the danger that jurors, conscientious as they may be, might permit human emotions, whether of sympathy or prejudice, to sway their minds when cool and careful thought is necessary in analyzing the testimony to arrive at the truth. Sympathy and prejudice are normal emotions in all of us. But to permit them to sway you in your deliberations not [312] only mean that you are violating your oaths as jurors, but it directly attacks the system that has been built up in this State to protect people against unlawful and criminal invasion of their rights.

The determination of the truth must be based upon the evidence produced in the case. The law of the State is then applied to the facts which you as the jury deem established according to the rules which I shall lay down for you.

Let me give you simple examples of what I mean by sympathy and prejudice. The crippled condition of the defendant might arouse sympathy. The fact that he has a family might arouse sympathy. On the other hand, his criminal record—that is, his prior criminal record—might cause prejudice. That is why I say to you that you must take the facts in this case and, as far as humanly possible, analyze them and decide the facts, and then apply to law as I tell you the law is, without sympathy and without prejudice. You can readily understand that you can't have one kind of law for a family man and another kind of law for a single man, one kind of law for a person in a crippled condition, and another kind of law for somebody who is in perfect condition.

You are to disregard the fact that I may have denied motions of counsel on either side during the course of the [313] trial. In other words, you heard motions made by both sides during the course of the trial, which motions were either granted or denied. I charge you that you are to disregard the fact that I may have either overruled or sustained objections of counsel. Attempts by counsel to introduce evidence which the Court excluded, and all arguments on questions of law and the ad-

missability of evidence raised by counsel, must be disregarded by you in your deliberations. The only factor which may enter into your consideration is the evidence actually before youfl

I explained to you that where the Court has sustained an objection to a question you must draw no inference from the question or from the fact that I sustained the objection, nor must you speculate as to what the answer might have been. The fact that a defendant has been indicted is neither proof nor evidence of guilt. An indictment is only an accusation, a charge made against the defendant by the grand jury. Under our law, every accused is assumed to be innocent. This presumption of innocence remains with the defendant until he is proven guilty; and the burden is on the prosecution to convince you beyond a reasonable doubt of the guilt of the defendant. That burden never shifts. The defendant is never obliged to prove his innoncence. Before you can convict a defendant in any criminal case you must be convinced of his guilt beyond a reasonable doubt.

[314] What does the law mean by the words "reasonable doubt"? A reasonable doubt is a doubt founded on reason, and arising out of the whole evidence or the lack of evidence in the case. A reasonable doubt must, therefore, be based entirely and absolutely upon some good, sound, substantial reason, without appeal to prejudice or sympathy or to the imagination. A juror who has such a reasonable doubt, and asserts it, ought not to refuse, and should be able, to give his fellow jurors his reasons for such a doubt.

A reasonable doubt is not any doubt whatsoever. No juror should conjure up a doubt to be used as a subterfuge to avoid the doing of a disagreeable duty. Before you can convict the defendant you must be convinced beyond a reasonable doubt of his guilt from the whole evidence. By the whole evidence I mean the evidence offered by the prosecution and by the defense.

You jurors are the exclusive judges of the facts. All questions of fact are for you to decide. The law says the Judge is to have no part in deciding questions of fact.

When we use the words "questions of fact" we mean what happened, what took place, what are the facts.

It is your duty as jurors to reason with each other, and make honest effort to agree on the facts, and to apply [315] the law to such facts. While it is the duty of each juror to discuss and consider the opinion of others, he must decide the case upon his own opinion of the evidence and upon his own judgment. No juror is required to surrender any conscientious views founded on the evidence. It is your duty to agree upon a verdict if that is possible without a violation of conscientious convictions. It is my duty to charge you on the law, and it is your duty to accept the law as declared by the Court. The jury has no right to question the correctness of any rule of law laid down and pronounced by the Court for the jury's guidance.

In your deliberation of the facts you have no right to consider the question of punishment. That is a matter solely for the Court to deal with in the event your verdict is that of guilt.

In judging the facts, the number of witnesses produced by either side is not the deciding factor. It is the quality and not the quantity of the witnesses that should control.

In judging the quality of the testimony you may take into consideration the demeanor, manner and bearing of the witness, his or her attitude whether neutral, friendly or hostile toward the prosecution or the defense. You should also consider the witness's capacity and opportunity for [316] knowledge or observation of the event or occurrence concerning which the witness has testified.

In passing on the credibility of the witnesses you have the right, in fact it is your duty, to draw on the experience you have acquired in every-day life. You are to apply to your decisions as jurors the same common sense you should in your every-day life. It is your duty to consider the evidence that has been given both on direct and on cross-examination.

If the jurors should reach the conclusion that any witness in this case has wilfully testified falsely to any material fact, you are at liberty to disregard altogether the testimony of that witness and to base your verdict upon the other evidence that remains in the case. You are not required to disregard all the evidence of a person who has wilfully testified falsely to a material fact. The jurors in such case may disregard so much of

the testimony as they find to be false, and may accept so much of it as they believe to be true. The choice is with you.

Witnesses are often referred to as interested witnesses or disinterested witnesses. An interested witness is one who is primarily or personally interested in the outcome of the case.

If you believe from the evidence that any witness who [317] has testified in this case is interested in the result of this trial, as a party or otherwise, then in determining the credit to be given to such witness the jury may take into consideration such interest as the evidence shows the witness has, together with all the other facts and circumstances disclosed by the evidence, if any, which will aid the jury in arriving at and determining the credit to which the testimony of such witness is entitled.

A disinterested witness is not, necessarily, entitled to be believed to a greater extent than an interested witness. That is, you must not disbelieve a witness because that witness is an interested witness or has an interest in testifying. On the other hand, you should not believe a witness merely because that witness is a disinterested witness or has no apparent interest in the outcome of this case.

The whole question of the interest of a witness, and its effect upon his testimony, is for you to decide.

Every defendant who testifies is an interested witness.

The fact that this defendant has been previously convicted is no proof of his guilt in this case. The only purpose for which you can consider the prior conviction is on the question of the degree of credibility of the defendant; that means the degree or extent to which you will believe the [318] testimony that he gave in this case. You have a right to say, "I will not believe a man with a criminal record to the same degree that I would believe one who has no criminal record." The defendant's previous crimes may be considered by you in deciding how much you believe his testimony. You may believe his testimony despite his record. The choice is with you.

Whenever you can consistently reconcile conflicting testimony, it is your duty to do so. Let me repeat that: Whenever you can consistently reconcile conflicting testimony, it is your duty to do so; because human experience has taught all of us

that persons seeing the same event at the same time may not be able to describe it exactly in the same way. That is the reason for this rule of law. But where you find any conflict of testimony that you cannot reconcile, do not hesitate to case aside that which you deem exaggerated, incorrect or wilfully perverted, and accept that which you believe to be correct and truthful.

You will recall that one of the witnesses who testified was Samuel Tabor, a chemist attached to the Police Department. He did not testify concerning the commission of the alleged crimes, but he testified to certain facts as he found them on making a laboratory examination of white powder submitted to him, and then expressed an opinion based on that examina-
[319] tion. Likewise, Detective O'Brien testified that it was his opinion that the paraphernalia found in the defendant's apartment was usually used by narcotic sellers and not by narcotic users.

Witnesses who are permitted to express an opinion are referred to in the law as expert witnesses, and the testimony they give is that of expert testimony as distinguished from eye testimony.

Now, expert testimony should not be accepted or rejected indiscriminately. Such testimony is to be weighed and considered by you, the same as any other evidence. After weighing and considering such evidence you are at liberty to disbelieve it when it is improbable or when it is incredible. You may disregard the testimony of an expert who in your opinion testified falsely or was mistaken with respect to any material fact or opinion. The results or opinions of an expert are not conclusive upon a jury; but you have no right to arbitrarily or lightly reject the testimony of an expert, nor should you reject it just because he is an expert.

The difference between an expert witness and an ordinary witness is that the ordinary witness testifies only to facts. The expert testifies to his opinion based on facts submitted to him. The fact that the witness is an expert does not [320] add credibility to his testimony. It merely adds weight to his opinion.

If, after you retire for deliberation, there be disagreement among you as to any part of the testimony, you have a right to

require that it be read to you, and the Court will direct that it be done. If you desire to be informed as to a point of law, or wish further instructions, you have a right to request such further information or instructions. In either case ask the court officer to return you to the courtroom for the reading of testimony or for further instructions, as may be necessary.

If, during the summation, either the Assistant District Attorney or the attorney for the defendant made statements as to what testimony was given during the trial, bear in mind that you, and you alone, are the sole judges as to what testimony was actually given.

Bear in mind that in criminal cases a verdict is not reached until all twelve jurors have agreed as to a verdict. I am making that statement because some of you, as I recall it, said you were serving in this Court for the first time. In civil cases a verdict may be rendered when ten out of twelve agree. In a criminal case there can be no verdict unless all twelve agree.

What I have charged you up to the present moment would [321] apply to all criminal cases. Now let me give you the law that is applicable to this particular case.

This defendant has been indicated on two counts: (1) unlawfully possessing a narcotic drug with intent to sell the same; and (2) unlawfully possessing a narcotic drug.

In your deliberations you will first consider the defendant's guilt or innocence of the first count of the indictment, to wit, unlawfully possessing a narcotic drug with intent to sell the same or any part thereof. If you find the defendant guilty on the first count, you will immediately report the results of your deliberations and not consider the defendant's guilt or innocence of Count Two, because Count One includes the facts that are in Count Two.

If you are unable to agree on the defendant's guilt or innocence of Count One, or if you find the defendant not guilty of the crime as charged in Count One, then you will consider the defendant's guilt or innocence of the crime charged in Count Two, to wit, unlawful possession of a narcotic drug.

For your convenience, and in order to facilitate your reporting the results of your deliberations, I have prepared a chart showing the crimes which you are to consider and upon which

you are to render your verdict. I have shown this chart to the lawyers on both sides, and I will give it [322] to the Foreman to take into the jury room. Before you take it, I will have it marked for identification.

Under our law, a person who, in violation of the provisions of the Public Health Law, possesses any narcotic drug is guilty of a crime. The Public Health Law prohibits and makes unlawful the selling, dispensing or possessing of narcotic drugs, except in certain cases specifically authorized by law. In general, these exceptions cover the use of narcotics by physicians, pharmacists, hospitals, and persons under medical treatment. The law provides for the licensing of manufacturers and wholesalers, and establishes strict rules and regulations for the selling or dispensing of narcotics in order to safeguard public health and prevent illegal traffic in narcotic drugs.

No claim is made on behalf of the defendant that he was authorized, under any of the exceptions enumerated in the Public Health Law, to possess narcotics. There is, therefore, no question before you concerning the legal right of the defendant to possess narcotics. In fact, the defendant admits the unlawful possession of the drugs, but he denies possessing the drugs with intent to sell.

Count One of the indictment charges that on or about December 21, 1950, in a room of an apartment at 527 West [323] 134th Street, this defendant unlawfully possessed and had under his control a quantity of narcotic drugs with intent to sell the same or any part thereof.

Our law provides that any person who possesses or has under his control any narcotic drug, as defined by the Public Health Law, with intent to sell, shall be guilty of a crime.

The Public Health Law defines heroin and cocaine as narcotic drugs. The white powder allegedly taken from the defendant, and in evidence in this case, has been identified by the City Chemist Tabor as heroin and cocaine. His analysis showed the weight to be over two ounces, approximately two and seven-thirty-seconds of an ounce, and contained more than three per cent of the alkaloids of heroin and cocaine, the percentage ranging from eighteen per cent in one package to as high as thirty per cent in another package.

Three elements make up the crime charged in Count One. (1) The substance must be a narcotic drug. There should be little question in your minds as to whether or not the substance allegedly taken from the defendant is a narcotic drug, because it has been identified by the City Chemist as a narcotic drug. The defendant admitted that the white powders are narcotic drugs. Nevertheless, under the law, before you can convict the defendant you must be convinced that the [324] substances introduced in evidence are narcotic drugs.

(2) There must be a knowing possession or control of a narcotic drug. Possession means a conscious possession, a knowing possession, being aware of the fact that you have a narcotic drug under your control. That is, a defendant must know that a narcotic drug is in his possession or under his control. Under this element you should likewise find no difficulty. The People's proof has shown the circumstances of the arrest of this defendant for allegedly unlawfully possessing a narcotic drug, the quantity of the drug which was seized, and the conversations between the police officers and the defendant at that time. In addition, the defendant admits that he unlawfully possessed the narcotic drugs, but claims that they were for his own personal use. But despite the defendant's admission, the law requires that you must be convinced beyond a reasonable doubt that the defendant unlawfully and knowingly possessed the narcotic drugs.

(3) The defendant's possession of the narcotic drug must be with intent to sell it, or sell any part of it. The question of the defendant's intent to sell is the important element under his count.

Intent is the state of mind of the perpetrator of the act at the time he commits it. In this case you are called [325] upon to say what was the state of mind of the defendant at the time he possessed these narcotic drugs. Did the defendant possess the drugs with an intention to peddle or sell any part of such drugs, or was it his intention to use the drugs only for himself? If the defendant possessed any of the narcotics with the intent to sell any part of it, he would be guilty as charged in Count One.

I have used the word "intent." Intent is a mental operation that can be proven usually only by the facts and circumstances surrounding the acts, and the events leading up to and following them. Science has not reached that stage whereby a person's mind can be X-rayed in order to disclose what thoughts are running through his mind. In determining this defendant's intent at the time he allegedly unlawfully possessed the narcotic drugs, you may consider all the facts and circumstances surrounding his arrest, what he said to the police officers, what he did, the fact that certain paraphernalia was found in his possession, such as a scale, a jar of milk sugar, gelatine envelopes used for packing the drugs, empty capsules, a stapling machine: all of which articles it is claimed are used by narcotic sellers in their unlawful trade.

Furthermore, in a case of this kind, possession of narcotics with intent to sell, the law creates a presumption, do [326] which we call a rule of evidence.

Now, there has been some discussion in the course of summation whether the Legislature enacted laws to help lazy District Attorneys by creating presumptions. It is not your concern; nor would you have a right, any more than I would, to be above the law. We must accept the law as the law is. The Legislature from time to time has made rules and regulations to help law-enforcement. For example, I recall when I first went on the bench we had cases in which a policeman became suspicious of a passing automobile and gave chase. While chasing the car he saw a couple of loaded revolvers tossed out of it. Even after the motorcycle cop caught up with the car from which these loaded revolvers had been tossed, unless the People could prove which person in the car had thrown out a particular gun, all the defendants had to be discharged. Those who know anything about playing pool or pocket billiards know that one player always says to the other: "Name your shot. Which pocket? Which ball?" In other words, we don't let him play blind: he has got to name his shot. And so far many years in the past, no one could be held or convicted under the circumstances outlined above because the People could not prove that a particular defendant had a particular gun. [327] The Legislature then passed a law in which it was provided that under

those circumstances it could be presumed that all occupants of the car had the guns. The defendants, if they wanted to, could explain whether the guns belonged to one or who they belonged to: the law would create a presumption.

And so in this case, the Legislature saw fit to create a presumption in law. Now, whether you and I agree with the presumption or not, we have no right to question it; we must take the law as we find it.

This rule of evidence provides that an intent to sell a narcotic drug is presumptively established by proof that the person knowingly possessed or had under his control a total of two or more ounces of certain preparations, compounds or mixtures containing three per cent. or more of the alkaloids of heroin or cocaine.

In this connection, you will recall the testimony of the chemist Tabor, who stated that the total weight of the white powder taken from the defendant was more than two ounces, and that the percentage of the alkaloids of heroin and cocaine in the white powder was more than three percent: one package contained about eighteen per cent., and others contained about thirty per cent. of heroin.

The defendant does not dispute the testimony concerning [328] the total weight and strength of the powder taken from him. He does, however, dispute that he intended to sell the drugs, or any part of them.

Stated another way, this presumption or rule of law entitles you to infer an intent to sell a narcotic drug upon proof that a person knowingly possessed or had under his control a total of two or more ounces of a preparation, compound or mixture which contained three per cent. or more of the alkaloids of heroin or cocaine.

This presumption may be rebutted. It may be rebutted by testimony that the defendant did not intend to sell, barter or exchange the narcotic drug, or any other testimony which to your mind rebuts the presumption. Under our law, you are not required or compelled to make this inference. However, the law says you would be justified in drawing the inference that there was an intent to sell if you were satisfied beyond a reasonable doubt that this defendant knowingly possessed

two or more ounces of a white powder which contained three per cent. or more of the alkaloids of heroin or cocaine.

Of course, before you can draw the inference that the defendant possessed the narcotic drug with intent to sell, you must consider all of the testimony that has been offered on both sides, including the testimony of the defendant as to [329] the nature of his possession of the drug and his claim that it was solely for his own use. You may find that the defendant possessed the narcotic drug with an intent to sell, from testimony in the case, without resorting to the presumption created by law, which I have just explained to you.

If from all the facts you are convinced beyond a reasonable doubt that the defendant unlawfully possessed or had under his control a narcotic drug with intent to sell the same, or any part thereof, then you should convict him under Count One. Should you come to a decision finding the defendant guilty under Count One of the indictment, you may discontinue further deliberations and immediately report your verdict.

If you are unable to agree upon a verdict under this count, or if you find the defendant not guilty, then consider his guilt or innocence under Count Two.

Count Two charges that the defendant unlawfully possessed a narcotic drug. The only difference between Count Two and Count One is that in Count Two there is no charge of an intent to sell any part of the narcotic drugs. The time and the place of the possession of the narcotic drugs are the same under both counts.

The People have offered proof tending to establish that the white powder taken from the defendant's possession was [330] heroin and cocaine, narcotic drugs, and that he knowingly possessed them. The defendant had admitted that he unlawfully possessed the narcotic drugs.

Under our law, the Court may not direct a verdict of guilty even though the defendant admitted that he unlawfully possessed the narcotic drugs as charged in Count Two. So I charge you that in order to convict the defendant under Count Two, you must be convinced beyond a reasonable doubt that the defendant unlawfully and knowingly possessed a narcotic drug.

If you are not so convinced, then you should acquit the defendant.

Let me add, one other thing: that if, in considering the two counts, there be any doubt on your part as to which of the counts the defendant is guilty of, you must give the defendant the benefit of the doubt. On the other hand, if the facts measure up to his guilt under Count One, then the law does not require you to compromise any verdict. Is that clear to you?

Your verdict will be one, and only one, of the following: Guilty of unlawfully possessing a narcotic drug with intent to sell, under Count One; or Guilty of unlawfully possessing a narcotic drug, under Count Two; or Not Guilty.

Any exceptions or requests?

Mr. GELB. No requests, your Honor.

[331] The COURT. Before you retire at this time, do you think you understand what I charged you as to the law on this case?

(All jurors nod in the affirmative.)

Let me again repeat that in the course of your deliberations should you desire further instructions, do not hesitate to ask for them.

(Thereupon the chart setting forth the forms of possible verdict was marked Court's Exhibit A for Identification.)

The COURT. The first twelve jurors being present and able to retire for deliberation, the first twelve jurors will retire; and the two alternate jurors are discharged with the thanks of the Court.

(The two alternate jurors leave the jury box, and the first twelve jurors retired to the jury room to commence their deliberations at 1:25 p.m.)

The COURT. Does the defendant consent that the jurors may have the exhibits if they ask for them?

The CLERK. Do you consent to the exhibits going into the jury room?

The DEFENDANT. Yes.

The CLERK. All right.

(At 5:20 p.m. the jurors returned to the court room, and the following proceedings were had.)

[332] The CLERK. Foreman, only, please rise. [Foreman stands.]

## Verdict

Ladies and gentlemen of the jury: have you agreed upon a verdict?

The FOREMAN. We have.

The CLERK. How say you with respect to the first count, charging the defendant with the crime of possessing a narcotic drug with intent to sell the same or any part thereof? How do you find the defendant?

The FOREMAN. We find the defendant guilty.

The CLERK. Hearken unto your verdict as it stands recorded. You say you find the defendant at the bar guilty of the crime of unlawfully possessing a narcotic drug with intent to sell the same or any part thereof, and so say you all.

The COURT. Do you want the jury polled?

Mr. GELB. We might as well.

The COURT. Poll the jury.

The CLERK. Ladies and gentlemen of the jury: You say through your foreman that you find the defendant guilty of the crime of unlawfully possessing a narcotic drug with intent to sell the same or any part thereof, under the first count.

Herbert Mandelman, is that your verdict?

The FOREMAN. Yes.

The CLERK. James F. Gibney, is that your verdict?

The SECOND JUROR. Yes.

[333] The CLERK. Lawrence Fuld, is that your verdict?

The THIRD JUROR. Yes.

The CLERK. Richard Lang, is that your verdict?

The FOURTH JUROR. Yes.

The CLERK. Nicholas F. Anile, is that your verdict?

The FIFTH JUROR. Yes, sir.

The CLERK. Alfred Adler, is that your verdict?

The SIXTH JUROR. Yes.

The CLERK. Louis Fuerst, is that your verdict?

The SEVENTH JUROR. Yes, sir.

The CLERK. Gerald H. Jacobson, is that your verdict?

The EIGHTH JUROR. Yes.

The CLERK. Constant R. Brose, is that your verdict?

The NINTH JUROR. Yes.

The CLERK. Leonard Clayton, is that your verdict?

The TENTH JUROR. Yes.

The CLERK. Dolly Stern, is that your verdict?

The ELEVENTH JUROR. Yes.

The CLERK. Madeleine S. Armstrong, is that your verdict?

The TWELFTH JUROR. Yes.

The CLERK. Hearken unto your verdict as it stands recorded. You say you find the defendant at the bar guilty of the crime of unlawfully possessing a narcotic drug with intent to sell the same or any part thereof, and so say you all.

[334–335] (The defendant was sworn, and his pedigree taken. The defendant stands mute on the question of previous convictions.)

The COURT. Members of the jury: You are discharged with the thanks of the Court.

(The jurors leave the court room)

Mr. GELB. The defendant reserves his motions until the day of sentence.

The COURT. Sentence, February 27th.

William Roven, Official Stenographer.

[336] (Stenographer's Certificate to foregoing transcript omitted in printing.)

[337] (Clerk's Certificate to foregoing transcript omitted in printing.)

[338] United States District Court, Southern District of New York, Office of the Clerk, U.S. Courthouse, Foley Square, New York 7, N.Y.
JAMES E. VALECHE, *Clerk.* MAY 21, 1963.

Mr. GEORGE ANGELET,
*#7546,*
*Drawer B,*
*Stormville, New York,*

Re: UNITED STATES OF AMERICA, EX REL, GEORGE ANGELET *vs* EDWARD M. FAY, WARDEN, GREEN HAVEN PRISON, STORMVILLE, NEW YORK

(Docket number: 63 Civ. 1457)

SIR: There is enclosed herewith copy of order dated May 21, 1963 signed by Judge Edmund L. Palmieri of this court.

The order and the papers previously received from you as acknowledged by our letter dated May 20, 1963 were filed under the above docket number and any further papers submitted should bear this docket number.

You are further advised your petition for a writ of habeas corpus will be placed upon the motion calendar, returnable in Room 318 on May 27, 1963 at 10:30 A.M. and you shall be duly notified of the Court's action thereupon.

Very truly yours,

JAMES E. VALECHE,
*Clerk.*

by D.S.
*Administrative Assistant to the Clerk.*

C.C. Hon. IRVING GALT, *Assistant Attorney General, State of New York, 80 Centre Street, New York 13, N.Y.*

[339]

PALMIERI, *J.*

[File endorsement omitted],

(63 Civ. 1457)

In United States District Court, Southern District of New York

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UNITED STATES OF AMERICA, EX REL, GEORGE ANGELET

*vs.*

EDWARD M. FAY, WARDEN, GREEN HAVEN PRISON, STORMVILLE, NEW YORK

*Order—May 21, 1963*

Upon reading the annexed affidavit of George Angelet requesting that he be permitted to file his petition for writ of habeas corpus without prepayment of fees or costs or security therefor, and it appearing to the Court that this application should be granted, it is

ORDERED, That the filing thereof be and hereby is permitted without prepayment of fees or costs or security therefor, in accordance with Section 1915(a), Title 28, U.S.C., and it is further

ORDERED, That the petition for writ of habeas corpus be placed on the appropriate Motion Calendar.

Dated: May 21, 1963.

EDMUND L. PALMIERI,
*U.S.D.J.*

[340]

United States District Court

Southern District of New York

Office of the Clerk

U.S. Courthouse

Foley Square, New York 7, N.Y.

JAMES E. VALECHE, *clerk.* JUNE 18, 1963.

Mr. GEORGE ANGELET,
*#7546;*
*Drawer B,*
*Stormville, New York.*

Re: U.S.A. EX REL GEORGE ANGELET *vs.* EDWARD M. FAY, WARDEN
(63 Civil 1457)

SIR: There is enclosed herewith copy of memorandum decision and order dated June 17, 1963, handed down by Judge Edmund L. Palmieri of this court and entered in the above entitled proceeding.

Yours very truly,

JAMES E. VALECHE,
*Clerk.*

By DAVID SWEENEY,
*Administrative Assistant to the Clerk.*

Copy to: IRVING GALT, *Asst. Attorney General, State of New York, 80 Centre Street, New York 13, N.Y.*

[341] CR MO 77 · MEMO 304

[File endorsement omitted]

In United States District Court, Southern District of New York

(63 Civil 1457)

UNITED STATES OF AMERICA EX REL., GEORGE ANGELET, PETITIONER

*against*

EDWARD M. FAY, WARDEN OF GREEN HAVEN PRISON, STORMVILLE, NEW YORK, RESPONDENT

*Memorandum decision and order—No. 304—June 17, 1963*

PALMIERI, J.

This is a petition for habeas corpus by a state prisoner who seeks to overturn his 1951 conviction on the grounds that such conviction was based upon evidence obtained as a result of an illegal search and seizure.

Petitioner raised this contention in the state courts by application for a writ of *coram nobis*. The application was denied without a hearing. The Appellate Division affirmed this denial and leave to appeal to the Court of Appeals was also denied. Application for a writ of *certiorari* is now pending before the Supreme Court.

[342–343] Since the decision in *Fay* v. *Noia*, 372 U.S. 391 (1963), petitioner is no longer required to seek Supreme Court review of the *coram nobis* proceedings before seeking relief in the federal courts. However, it would not be proper for this Court to rule on petitioner's contentions when they are presently the subject of an application before the Supreme Court. Accordingly, decision is reserved to abide the decision of the Supreme Court with respect to petitioner's application for *certiorari*, or until such other time as this Court may direct.

IT IS SO ORDERED.

Dated: New York, N.Y.
JUNE 17, 1963.

/s/ EDMUND L. PALMIERI,
*U.S.D.J.*

[344] [File endorsement omitted]

In United States District Court

Southern District of New York

JUNE 24, 1963.

Hon. EDMUND L. PALMIERI,
*United States District Judge,*
*Southern District of New York,*
*New York 7, New York.*

Re: *George Angelet* v. *Edward M. Fay*, 63 Civil 1457;

YOUR HONOR: By this letter relator shall endeavor to answer the respondent's opposing affidavit of May 24, 1963, in addition to, apprising the court of the action of the United States Supreme Court with respect to his petition for certiorari (*Angelet* v. *New York*, Misc. No. 1095, Oct. Term, 1962).

With respect to the latter, your Honor has reserved decision "to abide the decision of the Supreme Court." On June 17, 1963, the United States Supreme Court denied relator's petition for certiorari.

The notification of this determination, received from the Supreme Court, is appended herewith.

In response to the respondent's assertion, "there is a total absence of any factual allegations which might tend to support a claim that relator's conviction resulted from an unlawful search and seizure [345] in violation of his constitutional rights," we are constrained to observe from just a mere cursory inspection of respondent's opposing paper he (respondent) has obviously overlooked relator's state appellate division briefs submitted to this court in support of the instant application.

In any event, relator is submitting herewith a certified copy of his state court trial record.

Relator's peroration appertains to the issue of whether *Mapp* v. *Ohio*,[1] is to be retrospectively implemented.

The first federal appellate court to be heard from on this problem found the decision in *Mapp* as all constitutional decisions to be retroactive.[2]

---

[1] 367 U.S. 643.

[2] *Hall* v. *Warden, Maryland Penitentiary*, (4th Cir., 1963), 313 F. 2d. 483.

A petition for a writ of certiorari was denied, by the Supreme Court, once again reaffirming this ancient principle of our organic law.[3]

[346] Relator can only pray, that the treadmill legal journey has concluded and that this matter be noticed for a hearing at an early date.

Dated: Stormville, New York
JUNE 24, 1963.
Respectfully submitted,

GEORGE ANGELET,
*Relator in Person.*
*Drawer B., Stormville, New York.*

To:

Hon. EDMUND L. PALMIERI,
*U.S. District Court,*
*New York 7, New York.*

Hon. LOUIS J. LEFKOWITZ,
*80 Centre Street,*
*New York 13, New York.*
Att: A.A.G. Mortimer Sattler

[3] No. 909, U.S. Sup. Ct., Oct. Term, 1962, decided June 10, 1963, *sub nom Pepersack* v. *Hall.*

[347] *Attachment to letter*

Office of the Clerk

Supreme Court of the United States

Washington 25, D.C.

JUNE 17, 1963.

RE: *Angelet* v. *New York, No. 1095 Misc., Oct. Term, 1962*

DEAR SIR: The Court today denied the petition for writ of certiorari in the above-entitled case.

Very truly yours,

JOHN F. DAVIS,
*Clerk.*

By E. T. LYDDEM,
*Assistant.*

MR. GEORGE ANGELET, #7546,
*Drawer B,*
*Stormville, N.Y.*

[348] [File endorsement omitted]

In United States District Court Southern District of New York

(63 Cir. 1457)

UNITED STATES OF AMERICA ex rel. GEORGE ANGELET, RELATOR-PETITIONER

*against*

HONORABLE EDWARD M. FAY, AS WARDEN, GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT

*Affidavit in opposition—filed September 21, 1963*

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

MORTIMER SATTLER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York,

attorney for the respondent herein and make this affidavit in opposition to relator's application for a writ of habeas corpus hearing and other relief.

An examination of the petition herein and the exhibit attached thereto, being a copy of the brief submitted to the Supreme Court of the United States in connection with a pending application for a writ of certiorari, fails to disclose any substantial grounds which this Court might consider in determining whether or not to exercise discretion in the matter. There is a total absence of any factual allegations which might tend to support a claim that relator's conviction resulted from an unlawful search and seizure in violation of his constitutional rights. For this reason alone this application should be dismissed.

[349] It further appears from the petition that there is presently pending as aforesaid a petition for a writ of certiorari in the Supreme Court of the United States from a denial by the New York Court of Appeals to review an affirmance of the Appellate Division of an order dismissing an application for a writ of error coram nobis by the Court of General Sessions, County of New York. While it is true since *Townsend* v. *Sain*, certiorari need not be sought as a jurisdictional requirement nevertheless that case recognizes that such practice is permissible and available and that the Supreme Court in a proper case may elect to review. Since in this case it appears from the petitioner's own affidavit that he has the pending application before the Supreme Court it would be unseemly for this Court to accept this application in a parallel proceeding. Until the Supreme Court makes a decision one way or the other it is submitted that this application is premature.

Should this Court disagree with the above submission, the next question involved is the retroactivity of *Mapp* v. *Ohio*. This issue is presently under consideration by Judge Metzner of this Court in the *Matter of U.S. ex rel. Charles Emerick* v. *Denno* and legal memoranda have been submitted to him for his consideration by respondent and the office of Anthony F. Marra on behalf of Emerick. Copies of respondent's memoranda will be submitted should this Court so desire.

WHEREFORE, deponent respectfully submits that for the first two reasons set forth above application herein should be denied.

Mortimer Sattler
MORTIMER SATTLER.

Sworn to before me this 24th day of May, 1963.
LESTER ETERMAN,
*Assistant Attorney General of the State of New York.*

[356] [Certificate of service omitted in printing]

[351] In United States District Court,

Southern District of New York

To be submitted by H. Richard Uviller.

New York Supreme Court

Appellate Division—First Department

(63 Civ. 1457)

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*against*

GEORGE ANGELET, PETITIONER-APPELLANT

RESPONDENT'S BRIEF

STATEMENT

This is an appeal from a judgement of the Court of General Sessions, New York County (Davidson, J.) rendered on November 16, 1961, denying, without a hearing, appellant's motion for a writ of error coram nobis.

The petitioner was convicted on February 27, 1951, after a trial, for Feloniously Possessing a Narcotic Drug with intent to Sell (Penal Law, Sect. 1751), and sentenced as a second felony offender to a state prison term of not less than ten nor more than twenty years. Subsequently, the Appellate Division dismissed an appeal from that conviction on March 4, 1952.

THE INSTANT MOTION AND OPINION BELOW

The petitioner filed the present motion for a writ of error coram nobis on August 3, 1961. The motion alleged that his conviction was based upon evidence introduced in violation of the Fourth Amendment of the United States Constitution, and that coram nobis was a proper remedy to vacate and set aside the judgment. The Court (Davidson, J.) denied the motion without a hearing, upon the papers submitted by petitioner, in an order filed on November 16, 1961.

In denying petitioner's motion, the court below delivered the following opinion:

> "Petitioner moves to vacate and set aside a judgement of conviction rendered after trial on February 27, 1951 of the crime of felonious possession of a narcotic drug with intent to sell the same. Upon this conviction he was sentenced as a second felony offender to a term of ten to twenty years. The petitioner appealed [352] to the Appellate Division of the Supreme Court, but said appeal was dismissed by order dated March 4, 1952.
>
> "In support of this motion, the petitioner claims that his conviction resulted solely from evidence obtained as a result of an unlawful search of his home prior to his arrest by Federal and State narcotic agents. He urges that the recent decision of the United States Supreme Court in *Mapp* v. *Ohio* 367 U.S. 343 requires that evidence so allegedly obtained would now be subject to a motion to suppress, that no conviction could be obtained by using such evidence and that his conviction, being based on evidence illegally obtained in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States should be vacated and set aside.
>
> "At the time of the petitioner's trial and conviction, the courts in the State of New York followed the law enunciated in *People* v. *DeFore*, 242 N.Y. 13, wherein material evidence of any character, and irrespective of the manner in which it was obtained, if probative, was admissible in evidence. That interpretation of the law

by State Courts was sanctioned by *Wolf* v. *Colorado*, 338 U.S. 25. The recent case of *Mapp* v. *Ohio*, *supra*, has reversed *Wolf* v. *Colorado*, and State Courts now must follow the new Federal rule and are obliged to bar from evidence material obtained by searches and seizures in violation of the Fourth Amendment to the Constitution of the United States.

"The question presented on this motion is whether a conviction based, as the defendant claims, on material evidence, obtained as the result of an unlawful search, and admitted in evidence at his trial in 1951, should now ten years later be vacated and set aside by reason of the recent development of the law.

"Conceding arguendo that the evidence which resulted in the petitioner's conviction was obtained as a result of an unlawful search, should the rule of law laid down in *Mapp* v. *Ohio*, *supra*, have a retroactive effect to upset a conviction which took place ten years before the rule was enunciated.

"At the time of the trial, the petitioner knew how the evidence introduced against him had been obtained. Nevertheless, he made no notion to suppress the evidence or to prevent it from being introduced as a part of the case against him.

"Under Federal rule a defendant's failure to move to suppress evidence obtained as a result of an unlawful search at the time of the trial has been held to be a waiver of his constitutional rights. *Agnello* v. *U.S.*, 269 U.S. 20; *Amos* v. *U.S.*, 255 U.S. 313. Federal law also holds that the issue of the alleged illegality of the search and seizure, which produced the evidence resulting in a defendant's conviction, may not be raised for the first time after the trial. *Waldron* v. *U.S.*, 219 Fed. 2d 37; *U.S.* v. *Walker*, 197 Fed. 2d 287.

[353] "Were the prevailing federal rules applied to the instant case, petitioner's application would have to be denied due to his own inaction.

"Kings County Judge Sobel in *People* v. *Figuero*, N.Y.L.J. October 2, 1961 held that the *Mapp* case was

prospective only in its application. Such determination appears sound in this type of case. Accordingly, petitioner's application is denied."

POINT I

The petitioner may not collaterally attack a conviction based upon an alleged unconstitutional search and seizure by way of a writ of error coram nobis.

The petitioner, having long since exhausted his appellate remedy now seeks to enlarge the ambit of the extraordinary writ of coram nobis to encompass normally appealable matter. He seeks thereby to vacate a 1951 narcotics conviction on the grounds that the verdict was founded upon evidence which, although admissible at the time of the trial, is now barred under the authority of *Mapp* v. *Ohio* (367 U.S. 643 (1961)). His efforts, however, are ill-contrived. Both sound reason and parallel decisions firmly reject such distortion of the function of the writ.

In New York, coram nobis is essentially designed to correct fundamental faults which do not appear on the face of the record (*People* v. *Sadness*, 300 N.Y. 69 (1949), and it is generally not available where the alleged errors could be reviewed on appeal (*People* v. *Sullivan*, 3 N.Y. 2d 196 (1957), nor can coram nobis be utilized to circumvent a failure to appeal from an order within the prescribed time (*People* v. *Bojinoff*, 299 N.Y. 145 (1949). Nevertheless, in "exceptional circumstances," involving a violation of certain constitutional rights, these rules, although generally applicable, are not ironclad.

Initially, there can be no question that an allegedly erroneous admission of constitutionally barred evidence is normally subject to direct appellate review. The central issue, then, is whether a collateral attack by way of coram nobis can nevertheless be maintained solely because the allegation is that evidence procured by an unlawful search and seizure was utilized at the trial.

In the federal jurisdiction, Section 2255 of Title 22 of the United States Code provides a statutory parallel to New York coram nobis, and federal courts have consistently rejected the availability of this remedy to vacate a conviction based upon an

unlawful search and seizure (*Gaitman* v. *United States*, 295 F. 2d 277 (10th Cir. 1961; *United States* v. *Jenkins*, 281 F. 2d 193 (3rd Cir. 1960); *Barber* v. *United States*, 197 F. 2d 815 (10th Cir. 1952). In *United States* v. *Walker* (197 F. 2d 287, 288 (2d Cir. 1952) the court assumed arguendo that the evidence could have been suppressed by proper motions, but found that an appeal was the exclusive remedy.

[354] The Court quoted with approval the specific language of *Howell* v. *United States* (172 F. 2d 213 (4th Cir. 1949):

> "It is elementary that neither habeas corpus nor motion in the nature of application for a writ of error coram nobis can be availed of in lieu of a writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights."

The same approach has been followed by States which adopted the exclusionary rule prior to the *Mapp* case, in both California and Maryland, coram nobis or its equivalent was denied as a method to review a conviction founded upon unlawful evidence (*Banks* v. *Warden of Maryland Penitentiary*, 151 A. 2d 897 (1959); *People* v. *Cole*, 312 P. 2d 701 (1957).

Of course, the unusual feature of the present problem is the change in constitutional interpretation between the appeal from the judgment and the coram nobis petition. Appeal, it might be argued, appeared to be a futile remedy at a time when this point was legally foreclosed, as indeed must have appeared to Miss Mapp's attorney. Nevertheless, it has been repeatedly held that the normal remedy is the only one.

In *Sunal* v. *Large* (332 U.S. 174 (1946), the defendant sought a post-conviction remedy to avail himself of an evidentiary rule which changed after he had failed to appeal. Despite the intervening change of law, the Court denied relief by way of habeas corpus, observing:

> "The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases, but they were not * * *. Moreover, this is not a situation where the facts relied upon were

dehors the record and therefore not open to consideration and review on appeal * * * The argument is that since the state of the law made the appeals seem futile, it would be unfair to these registrants to conclude them by their failure to appeal * * * So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal." (At pp. 177–8).

Although the decision in *Sunal* v. *Large*, supra, concerns an evidentiary change and not a constitutional one, the position expressed by the Supreme Court was recently adopted in a most important decision which bears directly on the issue presented herein. In *Gaitan* v. *United States* (295 F. 2d 277 (10th Cir. 1961), cert. denied 369 U.S. 857 (1962) a collateral attack by way of federal coram nobis was directed at a search and seizure rendered unlawful subsequent to his appeal by the promulgation of *Elkins* v. *United States* (364 U.S. 206 (1960).

[355] The Elkins case, it will be remembered, held that evidence obtained as a result of an unconstitutional search and seizure conducted by state or local officers was inadmissible in the federal courts. In Gaitan, the defendant, in a pre-Elkins trail, was convicted on evidence collected during an unreasonable search performed by state officers. After observing that at the time of the trial the evidence was properly admitted, the court concluded that,

"The question whether the marihuana was admissible in evidence or should be excluded therefrom was put squarely in issue in the criminal case. The question was determined with pinpointed precision. The evidence was admitted and the judgments and sentences became final. Upon becoming final, they fell within the range of the doctrine of resjudicata as between the petitioner's and the United States in respect to the evidence being admissible or inadmissible, depending upon the circumstances under which it was obtained, and a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend ap-

> plication to the principle of resjudicata to such judgments or sentences. *Warring* v. *Colpoys*, 74 App. D.C. 303, 122 F. 2d * * *, Certiorari denied, 314 U.S. 678 * * *" (at p. 280).

By predicating the holding upon the concept of direct estoppel, the court in Gaitan effectively barred collateral contest of any issue which could have been raised at the trial, whether or not actually litigated (*United States* v. *Openheimer*, 242 U.S. 85 (1916); *Pray* v. *Hegeman*, 98 N.Y. 351 (1885); *Hahl* v. *Sugo*, 169 N.Y. 109 (1901)). Even if this be an overly broad reading of the decision, it is undeniably the law relative to search and seizure issues.

Moreover, the result of the foregoing is not effected by reference to several federal cases which allow collateral attack to undercut the primacy of appellate review. Most of these exceptions concern either the denial of right to counsel or involuntary confessions (*Hodges* v. *United States*, 282F. 2d 858 (1960) cert. granted 365 U.S. 904 (1956), and are pregnant with what the courts refer to as "exceptional circumstances" (*Lampe* v. *United States*, 288 F. 2d 881 (1960)). However, the decision in *Gaitan* v. *United States*, supra, clearly indicates that the area of search and seizure is not one which is to be considered "exceptional." Similarly in New York the denial of right to counsel is considered such a basic right that collateral attack by was of coram nobis is permitted regardless of whether the issue was raised on appeal (*People* v. *Selverman*, 3 N.Y. 2d 200 (1957); *People* v. *McGuinness*, 9 N.Y. 2d 690 (1961). However, in *People* v. *Noia* (3 N.Y. 2d 596 (1957)) the New York Court of Appeals found that an alleged involuntary confession could not be attacked by way of coram nobis. In explicit language, the court rejected resort to the "extraordinary" writ:

> "His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him to utilize the * * * extraordinary remedy of coram nobis * * * And this is so even though the asserted error of irregularity relates to a violation of a constitutional right." (At p. 601).

In an extensive and closely analyzed opinion, Justice Sobel in *People* v. *Eastman* (33 Misc. 2d 583 (kings Co., 1962)) denied

a writ of error coram nobis to vacate a pre-*Mapp* conviction. He observed that,

> [356] "A change of law, even on an issue of constitutional dimension, does not ipso facto constitute "exceptional circumstances."
>
> "Surely when a constitutional issue involves actual guilt or innocence our courts will permit collateral attack to prevent injustice * * * But as notes heretofore search and seizure issues are rarely concerned with the guilt or innocence of the accused."

Several other New York decisions have impliedly accepted this statement and held that coram nobis will not lie to vacate a pre-*Mapp* conviction where the appellate process has been exhausted (*People* v. *Paul*, 16 App. Div. 2d 745 (4th Dept. 1962); *People* v. *Seidenberg*, 221 N.Y.S. 2d 761 (Gen. Sess. 1961); *People* v. *Figueroa*, 220 N.Y.S. 2d 131 (Kings Co., 1961); *People* v. *Oree*, 220 N.Y.S. 2d 121 (Bx Co., 1961)).

The undeniable effect of the preceding analysis is to withhold from the petitioner and others beyond the pale a remedy for the alleged constitutional wrong. Costly though such a deprivation may seem, it is no more than the fair price for the orderly administration of justice. At most, we can acknowledge that he was convicted in the wrong legal era, before he could be accorded the measure of comfort which more modern times provides for his successors before the bar. Yet this jurisdiction has realistically recognized that contemporary developments cannot undo the results of previous adjudications. Thus, in *People* v. *Loria*, (10 N.Y. 2d 368 (1961)) the court ruled that it would apply the decision in *Mapp* only to cases still within the normal appellate process, and in *People* v. *Muller*, (11 N.Y. 2d 154 (1962)) it was held that, where the normal appellate process had been terminated and a judgment accorded finality, *Mapp* would be inapplicable. Specifically, the court there refused to allow a motion for reargument to reopen the appellate process to allow consideration of *Mapp*. (See also, *People* v. *Frioli*, 11 N.Y. 2d 157 (1962)).

Nor are these significant and practical limits on the availability of the *Mapp* holding inconsistent with the terms of that decision. Indeed, explicit sanction for the New York rule

both as to direct and collateral assertion of Fourth Amendment rights is found in the following language of the opinion:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." (367 U.S. 643, at p. 659 n. 9.)

CONCLUSION

The judgment denying the writ of error coram nobis should be affirmed.

Respectfully submitted,

FRANK S. HOGAN,
*District Attorney,*
*New York County.*

H. RICHARD UVILLER,
*Assistant District Attorney of Counsel.*

[357] In United States District Court, Southern District of New York

[To be submitted]

Supreme Court of the State of New York

Appellate Division—First Judicial Department

[U.S. District Court, S.D. of N.Y., filed September 21, 1963]

(63 Civ. 1457)

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*against*

GEORGE ANGELET, DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S BRIEF

STATEMENT

This is an appeal by defendant from an order of the Court of General Session entered on November 16, 1962, (Davidson, *J.*)

denying without a hearing defendant's application for a writ of error coram nobis moving for the invalidation of a judgment of conviction rendered on February 27, 1951, sentencing defendant to an intermediate term, as a second felony offender of from 10 to 20 years. Judgment being entered pursuant to a jury verdict convicting defendant under count one of a two count indictment (Ind. No. 2947–50) charging a violation of possessing a narcotic drug with intent to sell (Penal Law, Section 1751 Subdiv. 1).

The conviction rested upon the fruits of an unreasonable, illegal search and seizure without a warrant. Without the receipt of constitutionally tainted evidence upon defendant's trial, no prima facie case would have been established. The sole evidence (Narcotics) upon which the conviction was predicated was factually undisputed, upon the trial.

[358] On the seizure of the narcotics which formulated the ultimate and only issue of fact for the jury Detective Thomas W. O'Brien candidly testified that, accompanied with a brother Detective one Schein he arrived at defendant's residence as a Housepainter was emerging.

Without invitation nor formal introduction the Detective entered defendant's apartment and conducted a temporarily fruitless search, bottomed upon information from a nebulous source (23–76).* Neither Detective possessed a legal search warrant, nor was it contended upon the trial the search as incident to a lawful arrest (Code Crim. Proc. Sec. 177).

Agent Benjamin Fitzgerald was telephoned by Detective Schein and urged to come to defendant's flat in order to assist the search which until that time proved fruitless.

The testimony of Det. O'Brien and Agent Fitzgerald was consistent, inasmuch, both agreed, that Agent Fitzgerald unearthed the narcotics (Agent Fitzgerald, 111–121).

Upon cross-examination Agent Fitzgerald unequivocally admitted that the search of defendant's apartment was illegal under the "Federal Exclusionary Rule" (137).

*Numerals refer to the typewritten transcript of the trial proceedings. His wife, mother-in-law and children were also in attendance.

Defendant's trial counsel pursued a line of questioning of Agent Fitzgerald designed to demonstrate to the Court and jury, that the nexus connecting defendant to the crime charged in the indictment, was a product of an unreasonable, illegal search, without a warrant.

The assistant district attorney's objections, sustained by the Court, frustrated Counsel and deprived the defendant of a valid and cogent defense (137–138).

## THE UNDISPUTED FACTS

On December 21, 1950, defendant was in his abode, an [359] apartment located in a tenement at 527 West 137th Street, in the County of New York.

At noon of December 21, 1950, Detective Thomas W. O'Brien and Madel Schein attached to the Narcotic Squad of the Police Department forced their way into defendant's [359] apartment concomitant to the existing of a Housepainter, whom it developed was engaged to refurbish the defendant's apartment (25, 26, 27).

Subsequent, a rather informal acknowledgement of (Hello George) the Detective Schein and O'Brien informed defendant they were there expressly to search defendant's apartment in a quest for narcotics and a revolver (27).

Thus, Detective O'Brien was questioned in the following vein by the prosecution (26–27).

By Mr. Lappano:

"Q. You say that you saw the defendant George Angelet was at a table in the kitchen there? Is that Correct?—A. Yes Sir.

"Q. Now, suppose you tell his Honor and the jury what you said to him, if anything, and what he said to you; and what you did, what Schein did in your presence, what Schein said in your presence, to the defendant, and what the defendant said to you. Tell us the whole story, that is as best you can recall it. What happened after you got there.—A. Well, I walked into the kitchen first. Detective Schein was behind me. I said 'Hello George' to the defendant. He said 'Hello.' I said, 'I hear you have a load of stuff up here, and a gun.'

He said, 'Someone is kidding you. Someone is giving you a bad time.' I said, 'No, not this particular time. This time we're pretty definite. And if you do have any narcotics here, or if you do have a gun, you will save yourself a lot of trouble by giving it to us right now.' He said, 'No, someone is kidding you. I don't have anything here.' I said, 'If you have it, you might as well give it to us because *we're going to look for it, and we'll event-* [360] *ually find it.*' He said, 'I don't have anything.' So I said, 'Would you mind coming up and going into the bedroom?' He said, 'No, come on.' He got up from the table. He walked first. He walked us through the living room and into the first bedroom. And I said, to him, 'Do you sleep here?' And he said, 'No. That's my room there,' and indicated the bedroom on the right. I looked around the place. I said, 'It seems to be an awful mess.' There was baskets piled up with materials. He said, 'The Painters are here, and the place is being repainted, and everything is packed in those particular baskets.' I then said, 'You sit here in the bedroom, and we're going to start right here. *We'll search right from here.*' " [Emphasis supplied.]

The search encompassed the entire bounds of defendant's residence. Although Detective O'Brien testified he and his brother officer Schein ascertained the presence of sundry and diverse equipment purportedly (according to the Detective's testimony) employed in the narcotic traffic, their quest for illicit narcotics eluded them (34–35).

Detective Schein at the behest of his associate O'Brien called on the telephone a Federal Narcotic Agent one Fitzgerald, and urged he join and assist the Detective's in the search of defendant's apartment (36).

Upon his arrival Agent Fitzgerald was informed as to the extent the search had progressed and the lack of fruition thereof (36).

The Agent whose experience exceeded that of Detective's with respect to conducting searches thereupon joined the fishing expedition (38, 39, 115, 116).

Detective O'Brien testified Agent Fitzgerald joined in the search of defendant's residence and that it was Agent Fitzgerald who unearthed the illicit narcotics concealed under a hat in four (4) separate packages.

There was testimony by a chemist Samuel Tabor that, the four packages Agent Fitzgerald found in defendant's residence aggregated to two and seven-thirty seconds part of an ounce of [361] Heroin and 44 grains of Cocaine (102–103).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section I

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, 4th Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

New York Constitution, Article I, Section 12 provides in part:

> "The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons, or things to be seized."

26 U.S.C. (Supp. 5) Section 7607; provides in part:

> "The Commissioner * * * and agents of the Bureau of Narcotics * * * may—
>
> (2) make arrest without warrant for violation of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Section 1751, subdivisions 2 and 3 of the Penal Law.

CITATION BELOW

*People* v. *Angelet*, 221 N.Y.S. 2d 834.

POINT I. THE CONVICTION OF DEFENDANT RESTS ON THE ADMISSION OF EVIDENCE OBTAINED AS A RESULTS OF AN ILLEGAL SEARCH AND SEIZURE AND ACCORDINGLY, UNDER THE RECENT DECISION OF THE UNITED STATES SUPREME COURT, IN "MAPP V. OHIO," THE ORDER DENYING DEFENDANT'S APPLICATION IN THE NATURE OF A WRIT OF ERROR CORAM NOBIS MUST BE REVERSED

[362] This conviction rests entirely upon four items of evidence: four packages of narcotics found in defendant's apartment, by Federal Agent Fitzgerald, during a search, clearly violative of defendant's rights secured by the Fourth Amendment to the United States Constitution (137).

Agent Fitzgerald conceded the search of defendant's apartment was illegal. The following was elicited by defendant's trial counsel upon cross-examination of Agent Fitzgerald (137).

By defendant's Counsel Sol Gelb Esq:

"Q. Under the Federal Law, you are not supposed to break into a house?—A. Under any law you are not supposed to break into a house.

Q. But under Federal Law if you went in without a search warrant, the evidence would not be admissable?—A. Yes.

Mr. Lappano: May I respectfully object?

The COURT. Objection sustained.

Mr. Gelb. Wait a minute. I got a point.

The COURT. Objection sustained."

Defendant's Counsel was obviously frustrated in his endeavor to illustrate to the Court and jury the circumstances attending the search of defendant's home and his objection therefore.

The trial court by authoritative case law judicial directive sustained the prosecution's objections (People v. DeFore, 242 N.Y. 13; Wolf v. Colorado, 338 U.S. 25).

Defendant's counsel was constrained to abide by the Court's directive. Counsel was legally inhibited from asserting the

Constitutional impropriety of including evidence obtained without a warrant and in violation of the constitutional privilege against being subjected to an unreasonable search and seizure. It would [363] have been futile to endeavor to motion to suppress such evidence before or during the trial.

When defendant went to trial in 1951, the Code of Criminal Procedure was devoid of any statutory proviso whereof he could move to suppress the evidence obtained in contravention of his constitutional rights.

Absent the seizure of the narcotics, there would have been no prima facie case.

Defendant testified directly that at the time of the invasion of his apartment, he had just awaken. The door came flying open. Two men later identified as Detectives Schein and O'Brien stayed in the hallway within the apartment and Schein ran to the rear of the apartment (155).

The Detectives inquired of defendant "Where is the gun you shot the fellow with?" Defendant's protestation of innocence of any shooting was immediately followed by a search of the apartment (156).

On direct examination defendant testified (156):

> "Q. What about the numbers.—A. I told them that I had numbers. Question: Did he look for any?—A. No. Then Schein went to my room and started pulling out drawers and emptying them."

It is apparent that no effort was made to obtain a warrant.

The case was tried when the prevailing authority of *Wolf* v. *Colorado*, *supra*, sanctioned the receipt of evidence in State Courts, notwithstanding, the evidence be constitutionally tainted.

The defendant did no more than answer his intruder's query when a search of his apartment was commenced (156–157).

The cold print of the record is unable to suppress nor attenuate the utter disregard the Police manifested for defendant's rights.

[364] At page 156 of the record defendant testified on direct as follows:

> "A. I told them I had numbers.

Q. Did he look for any?—A. No. Then Schein went to my room and started pulling out drawers and emptying them.

Q. What did he say he was looking for?—A. He didn't mention then. He was just looking.

Q. You say he asked you, 'Where is the gun?'—A. Yes. I told him they were kidding him. I don't go around shooting anybody. Q. What else took place?—A. When he started searching, I said, 'Are you allowed to do that?'—He said, 'Well, we got a complaint.' They started searching, and I didn't say nothing. They made me stand in the corner of the room——

Q. What room?—A. My room.

Q. Yes?—A. And he just went about rummaging up the place."

It cannot be contended that defendant's apartment was searched in the course of a valid arrest. Defendant was arrested as the result of the search.

Nor, on this record, can it be claimed that defendant consented to the search of the apartment or the seizure of the illicit narcotics. As indicated above, defendant testified that the Detectives invaded his apartment upon the pretext "they had a complaint," and while the Detectives could have been called as rebuttal witnesses on the issue, they gave no testimony that defendant consented either to the search or to the seizure. *Karwicki* v. *United States*, 4 Cir. 53 F. 2d 225, 226; *Kovach* v. *United States*, 6 Cir. 53 F. 2d 639 *Judd* v. *United States*, 190 F. 2d 649, 651 (D.C. Cir. 1951).

Time and again, the Courts have held that a mere failure to object to a search by the police does not constitute a consent which would obviate the constitutionally prescribed need for a search warrant. "Acquiescence in the search, without clear consent, or mere submission in an orderly way to the actions of the federal agents is not a waiver." [Citing cases.] In the words of Judge [365] Bifkind, in Application *of Fried*, 68 F. Supp. 961, 964 (S.D.N.Y. 1946), "Non-resistance is not equal to consent. *United States* v. *Hoffenberg*, D.C.E.D. N.Y., 1938, 24 F. Supp. 989." See also *United States* v. *Novero*, 58 F. Supp. 275 (E.D. Mo. 1944).

The language of Justice Clark in *Mapp* v. *Ohio*, 367 U.S. 643 at page 656 is peculiarly applicable here, there Justice Clark wrote:

> "Seventy-five years ago in *Boyd* v. *United States*, 116 U.S. 616, 630 (1886) considering the Fourth Amendment and Fifth Amendments as running into each other on the facts before this Court held that the Doctrines of those Amendments:
>
> Apply to all invasions on the part of the Government and its employees of the sanetity of a man's home and the privacies of life. It is not the breaking of his doors and the *rummaging of his drawers*, that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property. *Breaking into a house and opening boxes and drawers are circumstances of aggravation;* but any forcible and compulsory extortion of a man's testimony or of his private papers to be used in evidence to convict him or to forfeit his goods is within the condemnation of those Amendments." [Emphasis supplied.]

The rummaging abhorrently alluded in *Mapp* v. *Ohio* is manifestly present in the instant case (156).

This record conclusively demonstrates a search and seizure without a warrant in plain violation of defendant's Constitutional rights. The fruits of the search were crucial to the conviction ultimately obtained. The conviction therefore, must be reversed.

POINT II. LACK OF OBJECTION TO THE RECEIPT OF PEOPLE'S EXHIBIT 6, 7, 8 AND 9 UNDER THE TOTALITY OF CIRCUMSTANCES ATTENDING THE INSTANT CASE SHOULD NOT MILITATE AGAINST DEFENDANT

[366] Defendant's counsel, fully aware of the mandated doctrine of law enunciated in *People* v. *DeFore*, 242 N.Y. 13 and reaffirmed in *Wolf* v. *Colorado*, 338 U.S. 25, was legally inhibited from interposing any objections to the introduction of evidence obtained by an unreasonable search and seizure.

In fact, repeated objections [1] of the use of evidence obtained in violation of the Fourth Amendment would constitute a juridical harassment.

Under the singular circumstances attending the instant issue defendant's failure to object [2] to the introduction of constitutionally tainted evidence should not militate against defendant.

The exclusionary rule now applicable to all states should in the interest of fundamental justice prevail in the instant case.

The *Mapp* v. *Ohio*, case overruled as a basic principle of law maintained and adhered within the framework of New York's criminal procedure. If defendant was to go to trial today the

---

[1] Defendant's counsel endeavored to elicit from the witness Fitzgerald the anomalous manner in which the evidence was procured. The prosecutor's objection predicated upon the sanctions of *DeFore* and *Wolf* were sustained by the trial court (137). See also Point I of this Brief.

[2] *People* v. *Friola*, (11 N.Y. 2d 157) dissenting opinion at page 161, by Chief Judge Desmond: "We are now saying that we will not apply the new law in a pre-*Mapp* case unless on the trial the defendant's counsel did what was then futile, unreasonable and contrary to the then law, that is, object to the admission of testimony which under the unquestioned New York law and Federal law (*People* v. *DeFore*, 242 N.Y. 13, cert. den. 270 U.S. 657; *Wolf* v. *Colorado*, 338 U.S. 25) was clearly admissable. So the client whose counsel took a groundless objection gets the benefit of the later (*Mapp*) change in law while the client whose lawyer refrained from mouthing a meaningless objection is prejudiced because his lawyer took the correct position. So restricted an application of the general rule. "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied" (*United States* v. *Schooner Peggy*, 1 Cranch (5 U.S. 103, 110, quoted in *Robinson* v. *Robin Dry Dock & Repair Co.*, 238 N.Y. 271, 281).

We are here "denying" the law of *Mapp* (supra) is a case in which, as we shall show, *Mapp* is clear authority for a reversal. There is nothing in New York Law which [367] says that we are deprived of jurisdiction by the absence of an objection. Neither the constitution nor any statute raises such a bar. An objection is ordinarily made by a party to call the court's attention to a point of existing law and, in the event of its being overruled, to preserve for the appellate court "the question of law that he hopes thereafter to review in (that) court" (*People* v. *Bresler*, 218 N.Y. 567, 573). The requirement of an objection is waived when "justice and fairness" so dictates (*People* v. *Nixon*, 248 N.Y. 182, 189). Surely this is a case for such a waiver. This court should not put itself in the position of insisting on an objection to call attention to a question of law "which did not exist at the time."

*Mapp* v. *Ohio* case would prohibit the introduction of narcotics (People's Exhibit, 6, 7, 8 and 9) obtained from defendant's apartment, by virtue of an unreasonable search and seizure. Fundamental justice should now secure defendant's rights. The time element should not be allowed to thwart true justice.

POINT III. THE RULE LAID DOWN IN "REA V. UNITED STATES," 350 U.S. 214, SUBSEQUENT DEFENDANT'S CONVICTION EXEMPLIFIES THE EGREGIOUS CHARACTER OF THE ASSAILED SEARCH AND SEIZURE OF THE SOLE EVIDENCE INTRODUCED AT DEFENDANT'S TRIAL.

*(A) The writ of error coram nobis is the sole and proper post conviction remedy for redress*

In *Rea* v. *United States*, 350 U.S. 214, the rule prohibiting Federal Officers from testifying in State Courts in cases where they co-joined with State authorities in conducting searches violative of the Federal exclusionary rule as unequivocally enunciated.

Thenceforth, with the federal officer was precluded from testifying in State court trials anent any evidence procured in violation of the federal exclusionary rule.

[368] Notwithstanding, such evidence may be juridically acceptable under state court standards.

Were defendant to be tried today the evidence adduced at the former trial would be incompetent not only under *Mapp* v. *Ohio*, but also under *Rea.* v. *United States*, 350 U.S. 214.

An inescapeable consequence of the *Mapp* and *Rea* cases is to underscore the exceptional constitutional dimensions of the issue here. Defendant's conviction and imprisonment is an overt product of reckless law enforcement by federal and state employees. Such exceptional circumstances, as reflected by this record demand a post conviction remedy for redress (See Stimson, Retroactive Application of Law—A Problem in Constitutional Law, 38 Mich. Law Review 30, 1958). See also *Commonwealth* v. *Spofford* (180 N.E. 2d 673) where the Supreme Court of Massachusetts held:

> "This complete reversal of so recent a ruling necessarily affecting many State court convictions whether the

> *Mapp* ruling should be given only prospective operation. Indeed at least one court has so held. But the Supreme Court did not limit the *Griffen* v. *Illinois* (351 U.S. 12) to prospective operation as has been suggested in the concurring opinion of Frankfurter, J. (pp. 25026, 76, S.Ct. pp. 585, 586). See *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (357 U.S. 213), which in 1958 applied the Griffen rule to a conviction occurring in 1935 * * * We observe nothing in the *Mapp* majority opinion which indicates an intent that it be confined to prospective operation, assuming such position could be soundly taken."

The panoply of due process shall be presented not only at the inception of a trial (*Tompkins* v. *Missouri*, 323 U.S. 385) and maintained throughout the proceedings (*Tumey* v. *Ohio*, 273 U.S. 510) but should be carried along pass trial practice (*Mooney* v. *Holohan*, 294 U.S. 103, 113).

The Supreme Court of the United States, has insisted each State provide some adequate remedy whereof a post trial procedure is available to test the legality of a conviction even though it appears proper on the surface so that the question of funda[369]mental justice protected by due process may be tested (*Carter* v. *Illinois*, 329 U.S. 173, 186).

The "due process" mentioned in the Constitution of the United States, is not a judicial favor, it is a right of every citizen. When a conviction is obtained without "due process" a conviction thus obtained is void *ab initio*.

The resurrection from an ancient tomb of the writ of error coram nobis, restored to prestige in this State, was primarily to comport with the United States Supreme Court mandate for adequate *post* conviction remedy contemplating a set of circumstances recited within the framework of this brief and supported by the trial proceedings. *People* v. *Silverman*, 3 N.Y. 2d 200; *People* v. *Mangi*, 10 N.Y. 2d 86; *People* v. *Koch*, 299 N.Y. 378; *Noia* v. *Fay*, Second Circuit Court of Appeals (1962); *Jordan* v. *United States*, 352 U.S. 904; *Askins* v. *United States*, 251 F. 2d 909; *People* v. *Howard*, 224 N.Y.S. 2d 886; *People* v. *Stevenson*, 13 App. Div. 2d 717.

CONCLUSION

The writ of error coram nobis is the proper vehicle for the relief sought; "Mapp *v.* Ohio," requires retrospective application here in view of the exceptional circumstances reflected by the trial record; the order appealed from should be reversed; the writ should issue and a new trial ordered.

Respectfully submitted,

GEORGE ANGELET,
*Drawer B,*
*Stormville, New York.*

[370] United States District Court, Southern District of New York, Office of the Clerk, U.S. Courthouse, Foley Square, New York, N.Y. 10007

JAMES E. VALECHÉ
Clerk

SEPTEMBER 23, 1963.

Mr. GEORGE ANGELET,
*#7546, Drawer B,*
*Stormville, New York.*

Re: *U.S.A. ex rel, George Angelet,* vs *Edward M. Fay,* Warden.

(63 Civil 1457.)

SIR: There is enclosed herewith copy of memorandum decision and order dated September 20, 1963, handed down by Judge Edmund L. Palmieri of this court and entered in the above entitled proceeding.

Yours very truly,

JAMES E. VALECHÉ,
*Clerk.*

By DAVID SWEENEY,
*Administrative Assistant to the Clerk.*

Enc:
Copy to: IRVING GALT, Esq.,
*Asst. Attorney General for State of New York,*
*80 Centre Street,*
*New York 13, New York.*

[371] In United States District Court
Southern District of New York

UNITED STATES OF AMERICA EX REL., GEORGE ANGELET, RELATOR-PETITIONER,

*against*

HON. EDWARD M. FAY, AS WARDEN OF GREEN HAVEN PRISON, STORMVILLE, N.Y., RESPONDENT

(63 Civil 1457)

*Memorandum Decision and Order—No. 304A—September 20, 1963*

PALMIERI, *J.*

This is a petition for habeas corpus by a state prisoner, claiming that illegally seized evidence was admitted at his trial, and that he is now entitled to his release under the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The petitioner was convicted on a charge of possessing narcotics with intent to sell, and was sentenced on February 27, 1951 to an indeterminate term of from 10 to 20 years. No objection was raised at trial to the admission of the evidence, for at that time New York permitted the introduction of such evidence, however obtained. *Wolf* v. *Colorado*, [372] 338 U.S. 25 (1949); *People* v. *Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

Petitioner appealed from that conviction, but his appeal was dismissed by the Appellate Division on March 12, 1952, 112 N.Y.S. 2d 317. No further action was taken by petitioner until August 1961, after the Supreme Court had announced its decision in *Mapp*, when a motion was made for a writ of error *coram nobis*. Petitioner carried this motion, unsuccessfully, through the state courts, and up to the Supreme Court, which denied certiorari on June 17, 1963, 10 L. Ed. 2d 1059. The question presented in the instant petition, the same presented in the state courts below, is whether the rule in the *Mapp* case is to be applied retroactively.

For the purpose of deciding this question, the Court may assume, *arguendo*, that the search and seizure were conducted in

violation of the Fourth and Fourteenth Amendments to the Constitution. The minutes of the trial, in fact, contain nothing to the contrary. Still, if this be so, I do not feel that it requires the reversal, twelve years later, of a conviction which was legally obtained under the law in force at [373] the time of trial, and which law remained in force for a decade thereafter.

Several weeks ago, in a case quite analogous to this case, a petition for habeas corpus was denied by Judge Metzner of this court. *United States ex rel. Emerick* v. *Denno*, No. 29093 (July 31, 1963). In his opinion, Judge Metzner recognized the conflicting views taken by different courts of appeals regarding the retroactive application of the *Mapp* rule. *Compare, e.g. Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963), holding *Mapp* to be prospective, *with Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963), *cert. denied sub nom. Peppersack* v. *Hall*, 374 U.S. 809 (1963), holding *Mapp* to apply retroactively. Judge Metzner also recognized that there is, as yet, no definitive pronouncement in this matter. His conclusion, with which I agree, was that the *Mapp* rule should not be given retroactive application.

Although it is not necessary for my decision, it is perhaps worth repeating that Angelet, the petitioner here, was convicted in a trial which accorded him full due process of law, and that, as the law of the land then stood, there [374–375] was no reason for the State of New York to otherwise conduct his trial, or even to believe that it should have been otherwise conducted.

The petition for a writ of habeas corpus is denied. The petitioner is granted a certificate of probable cause pursuant to 28 U.S.C. § 2253.

IT IS SO ORDERED.

Dated: New York, N.Y., September 20, 1963

(S) EDMUND L. PALMIERI,
*U.S.D.J.*

[376] UNITED STATES GOVERNMENT MEMORANDUM

Date: September 27, 1963.

To: Judge Palmieri.
From: Clerk's office.
Subject: *U.S.A. ex rel. George Angelet* vs *Hon. Edward M. Fay, Warden, etc.*, 63 Civil 1457.

The attached notice of motion for leave to appeal in forma pauperis and for assignment of counsel was received in the Clerk's Office this morning.

Your Honor denied the petition for writ of habeas corpus but granted petitioner a certificate of probable cause. We hand up the file in this case.

[377] [File endorsement omitted]

In United States District Court, Southern District of New York
(63 Civil 1457)

UNITED STATES OF AMERICA, EX REL., GEORGE ANGELET, RELATOR-PETITIONER

*against*

HONORABLE EDWARD M. FAY, AS WARDEN OF GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT-APPELLEE

Notice of and affidavit of George Angelet petitioning for leave to proceed in forma pauperis, assignment of counsel and bail—filed October 2, 1963

SIRS: Please take notice that, upon the annexed affidavit of George Angelet and the prior proceedings herein the undersigned will move this court at a term of motions thereof to be held at the United States Court House, Foley Square, Room 318, New York City, New York, at ten-thirty o'clock in the forenoon on the 30th day of September, 1963, for (1) leave to proceed *in forma pauperis* relative to an appeal taken to the United States Circuit Court of Appeals for the Second Circuit pursuant to the issuance of a certificate of probable cause (28

U.S.C. sec. 2253) on September 20, 1963 (Hon. Edmund L. Palmieri, *J.*); (2) the assignment of appellate counsel and (3) for the fixation of reasonable bail *pendente lite*.

Dated: Stormville, New York, the 25th day of September, 1963.

Yours, etc.,

GEORGE ANGELET,
*#7546,*
*Drawer B,*
*Stormville, New York.*

To:

Honorable LOUIS J. LEFKOWITZ, *Attorney General, New York State, 80 Centre Street, New York 13, New York.*
JAMES E. VALECHE, *Clerk, United States District Court, Southern District of New York.*

[378] In United States District Court,
Southern District of New York

(63 Civil 1457)

UNITED STATES OF AMERICA, EX REL., GEORGE ANGELET, RELATOR-PETITIONER

*against*

HONORABLE EDWARD M. FAY, AS WARDEN OF GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT-APPELLEE

STATE OF NEW YORK,
*County of Dutchess, ss:*

George Angelet, being duly sworn, deposes and says: I am the above-named relator and make this affidavit in connection with an appeal taken to the United States Court of Appeals for the Second Circuit. On September 20, 1963, the Honorable Edmund L. Palmieri, United States District Judge, denied relator's application for a writ of habeas corpus holding that the decision of the United States Supreme Court in *Mapp* v. *Ohio* (367 U.S. 643) is not to be retrospectively implemented. Judge Palmieri granted the relator a certificate of probable

cause [1] so as to allow an appeal to the United States Court of Appeals. A seasonable notice of appeal, dated September 25, 1963, has been duly filed. Relator is bereft of funds; possesses no property of chattels which can be converted to cash. He respectfully prays that this Court permit the appeal taken to be prosecuted in forma pauperis and that appellate counsel be assigned to prosecute the appeal.

[379] This case presents a proper subject for the exercise of the inherent power of this Court to fix bail pending appeal. *Compare, e.g., Johnston* v. *Marsh*, 227 F. 2d 528.

To militate against a pyrrhic victory here, bail pending a definitive answer to the problem occasioned by the advent of *Mapp*, is manifestly required. Indeed, this case may yet lay anchor in the United States Supreme Court. The expenditure of not only effort, to present the issues in their most illuminous posture, is to be accorded exalted consideration, but also, the time the realtor must perpetuate incarcerated, unless he is released on bond.

The sovereign will have lost little, if anything, should *Mapp* be held upon appeal to be prospective, and the relator re-incarcerated, while the contrary be true, should *Mapp*, as a constitutional directive, be held perforce retroactive, and the relator not released on bond during the pendency in litigation.

Wherefore, relator prays that the relief sought be granted in all respects.

Respectfully submitted.

George Angelet,
GEORGE ANGELET,
*#7546, Drawer B,*
*Stormville, New York.*

Sworn to before me this 25th day of September 1963.

George M. Snyder,
GEORGE M. SNYDER,
*Notary Public, Dutchess County.*

My commission expires Mar. 30, 1964.

[1] The order granting a certificate of probable cause was entered simultaneous with the order denying the application for a writ of habeas corpus.

[380] [File endorsement omitted]

Petitioner's motion for leave to proceed *in forma pauperis* and for the assignment of counsel on his appeal is granted. Leon Polsky, Esq., 100 Centre Street, New York, New York, has agreed to represent petitioner and is assigned to represent him on the appeal.

The petitioner's application for the setting of bail is denied.

IT IS SO ORDERED.

EDMUND L. PALMIERE,
Edmund L. Palmieri,
*U.S.D.J.*,

[381] United States District Court

Southern District of New York

Office of the Clerk

U.S. Courthouse

Foley Square, New York, N.Y. 10007

JAMES E. VALECHÉ
Clerk

OCTOBER 2, 1963.

Mr. GEOLGE ANGELET,
*#7546, Drawer B. Stormville, New York.*

Re: *UNITED STATES OF AMERICA* ex rel., *GEORGE ANGELET* vs. *EDWARD M. FAY, Warden.* (63 Civil 1457)

SIR: There is enclosed herewith a copy of memorandum decision and order dated October 1, 1963 handed down by Judge Edmund L. Palmieri of this court and entered in the above entitled proceeding.

Please be advised we have this day filed your notice of appeal, since Judge Palmieri has granted your motion for leave to proceed in forma pauperis and for assignment of counsel on appeal.

Very truly yours,

JAMES E. VALECHÉ,
*Clerk.*

By FRANK P. CASTELLANO,
*Deputy Clerk.*

Encl.

C./C. LEON B. POLSKY, Esq.,
*Legal Aid Society,*
*100 Centre Street,*
*New York, New York, 10013.*

Hon. IRVING GALT,
*Assistant Attorney General,*
*State of New York,*
*80 Centre Street,*
*New York, New York, 10013.*

[382] [File endorsement omitted]

In United States District Court, Southern District of New York

*Notice of Appeal—Filed October 2, 1963*

SIRS: Please take notice that, the above-named Relator George Angelet hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York entered on September 20, 1963 (Honorable Edmund L. Palmieri, U.S.D.J.) denying relator's petition for a writ of habeas corpus and from each and every part of said order.

Yours etc.,

GEORGE ANGELET,
*# 7546, Drawer B,*
*Stormville, New York.*

To:

Honorable LOUIS J. LEFKOWITZ,
*Attorney General, New York State,*
*80 Centre Street,*
*New York 13, New York.*

JAMES E. VALECHE, *Clerk,*
*United States District Court,*
*Southern District of New York,*
*United States Court House,*
*Foley Square,*
*New York City 7, New York.*

[383] (Clerk's certificate to foregoing transcript omitted in printing)

[384] (Clerk's certificate to foregoing transcript omitted in printing.)

[385] In United States Court of Appeals For the Second Circuit

No. 251—September Term, 1963.

(Argued November 21, 1963
Submitted to the *in banc* court June 1, 1964

Docket No. 28511

UNITED STATES EX REL. GEORGE ANGELET, PETITIONER-APPELLANT

*against*

HONORABLE EDWARD M. FAY, AS WARDEN OF GREEN HAVEN STATE PRISON, STORMVILLE, NEW YORK, RESPONDENT-APPELLEE

Before LUMBARD, Chief Judge, MEDINA, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, Circuit Judges

*Opinion—*.

Appeal from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*.

Petitioner appeals from an order denying, without a hearing, his petition for a writ of habeas corpus sought on the ground that he was convicted on the basis of illegally seized evidence. Opinion below not reported. Affirmed.

[386] LEON B. POLSKY, New York, N. Y. (Anthony F. Marra, New York, N.Y., on the brief), *for petitioner-appellant*.

RONALD J. OFFENKRANTZ, Assistant Attorney General of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirschowitz, First Assistant Attorney General, and Irving Galt, Assistant Solicitor General, New York, N.Y., on the brief), *for respondent-appellee*.

MEDINA, *Circuit Judge* (with whom LUMBARD, *Chief Judge*, WATERMAN, MOORE, FRIENDLY, KAUFMAN and HAYS, *Circuit Judges*, concur):

George Angelet, having exhausted his state remedies, petitioned for federal habeas corpus on the ground that his state court conviction, in 1951, for possession of narcotics with intent to sell, was obtained through admission of evidence allegedly seized in an unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments. Assuming, *arguendo*, that the search and seizure was conducted in violation of the Constitution, Judge Palmieri nevertheless denied the petition, as he concluded that the exclusionary rule of *Mapp* v. *Ohio*, 1961, 367 U.S. 643, ought not to be applied retroactively.

After the appeal was heard by a panel consisting of Judges Medina, Waterman and Marshall, the qualified judges of this Court agreed that the appeal should be considered *in banc*.

We have examined the transcript of the trial of Angelet with some care and find the search and seizure was illegal and an invasion of Angelet's constitutional rights. On [387] December 21, 1950 two detectives attached to the Narcotics Squad of the New York City Police Department entered Angelet's apartment by a door opened by a painter who was just leaving. Angelet's rather mild protest was brushed aside, no warrant was produced, and the detectives, together with an agent of the Federal Bureau of Narcotics and his associate, who were summoned by telephone, completely ransacked the apartment. There is nothing to indicate that the officers sought or obtained permission to enter the apartment or that the detectives announced their presence before entering. The search could not have been incidental to an arrest as no arrest was made until after the search had been concluded, when one of the detectives said: "All right, George, you're under arrest. You better get dressed, and put your clothes on."

It was noon when the search was made, and there was no physical coercion, violence or brutality of any kind. Nevertheless, there was a plain and unwarranted invasion of Angelet's home and everything in the apartment was thoroughly rifled and examined. One of the detectives found in a drawer of the

dresser fifty-four cellophane envelopes (introduced at the trial as Exhibit 1), one hundred and six empty capsules (Exhibit 2), a stapling machine (Exhibit 3), a box of staples (Exhibit 4), and a scale (Exhibit 5). The federal agent found under a hat four packages (Exhibits 6, 7, 8 and 9). Three of these packages contained heroin and the other contained eighteen capsules of cocaine.

The search of Angelet's apartment, the subsequent trial and the appeal therefrom all occurred after the decision of the Supreme Court in *Wolf* v. *Colorado*, 1949, 338 U.S. 25, but before the events which directly led to the Supreme Court decision in *Mapp* v. *Ohio*, *supra*, 1961, 367 U.S. 643. Thus, it was already clear, at that time, that the Fourteenth Amendment prohibited unreasonable searches and yet it [388] was also plain that the evidence produced by such a search, under the view then prevailing in the Supreme Court, was admissible in a state court prosecution, if state law so provided.

Perhaps there is no totally satisfying solution to the exceedingly difficult problem of whether the exclusionary rule announced in *Mapp* v. *Ohio* should be applied to all criminal trials which preceded that decision. Compare *United States ex rel. Linkletter* v. *Walker*, 5 Cir., 1963, 323 F. 2d 11, cert. granted, 1964, —— U.S. ——, 32 U.S. L. Week 3400, *Sisk* v. *Lane*, 7 Cir., 1964, &—— F. 2d ——, and *Gaitan* v. *United States*, 10 Cir., 1963, 317 F. 2d 494, with *People* v. *Hurst*, 9 Cir., 1963, 325 F. 2d 891, and *Hall* v. *Warden*, 4 Cir., 1963, 313 F. 2d 483, cert. denied, 374 U.S. 809. On balance, however, we conclude that neither the purpose of the exclusionary rule nor the sound administration of the criminal law would be advanced by overturning the conviction of Angelet and that no serious philosophical obstacle prevents us from affirming the denial of the writ of habeas corpus.

## I. PRELIMINARY COMMENT

It is not surprising that there has been discussion of various phases of the situation from which inferences have been drawn concerning the attitude of the Supreme Court on the question of the retroactivity of *Mapp* v. *Ohio* at the time the decision was filed. For example, the Court may have doubted its power

to make an *ex cathedra* prediction, and therefore chose not to reach the issue of its power under the Constitution to overrule a prior holding except when necessary to decide an actual case or controversy. See Comment, 1962, 71 Yale L.J. 907, 930–933. It may be that, as the application of the new doctrine to Miss Mapp was [389] retroactive in the sense that the occurrences took place some years before the decision, logic requires the court to apply the doctrine retroactively as to all persons previously convicted by the admission of such evidence. It has been suggested that review of any conviction which had not yet become final at the time of the *Mapp* decision could have been the vehicle for overruling *Wolf*, and that, therefore, it would be unfair to deny relief to the defendants in those cases simply because *Wolf* was overruled at an earlier date. See *United States ex rel. Linkletter* v. *Walker*, *supra*, 5 Cir., 1963, 323 F. 2d 11, 19, cert. granted, 1964, — —U.S. ——, 32 U.S. L. Week 3400; Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 1962, 110 U. Pa. L. Rev. 650, 673–678. Perhaps for this reason, the rule of *Mapp* v. *Ohio* has been applied by the Supreme Court on direct review of convictions not yet final at the time *Mapp* was decided. See *Ker* v. *California*, 1963, 374 U.S. 23; *Fahy* v. *Connecticut*, 1963, 375 U.S. 85; *Stoner* v. *California*, 1964 —— U.S. ——.

There had been speculation as to the relevancy to our problem of the circumstance that *Wolf* was overruled in a case involving direct review of a conviction rather than in a collateral post-conviction proceeding. See Bender, *supra*, 110 U. Pa. L. Rev. 650, 679 n. 92. Compare *Gideon* v. *Wainwright*, 1963, 372 U.S. 335.

It is even argued that this case presents no real question of retroactivity because *Wolf* v. *Colorado*, decided before the search of Angelet's apartment, had already made it clear that the search violated Angelet's constitutional rights and *Mapp* v. *Ohio* merely removed a procedural bar to the assertion of those rights.

The discussion thus summarized, and there is much more to the same effect, adds up to more or less reasonable guesswork on the subject of the intention lurking in the minds of the learned justices at the time the opinions in [390] *Mapp* v. *Ohio*

were filed on June 19, 1961. The plain fact remains that none of the opinions gives any sure indication that the Court entertained at the time of filing any view on the subject of general retroactivity. See *United States ex rel. Linkletter* v. *Walker, supra*, 5 Cir., 1963, 323 F. 2d 11, 15–16 (and cases and other authorities there cited), cert. granted, 1964, —— U.S. ——, 32 U. S. L. Week 3400. It is far more reasonable to assume that the Court was fully aware of the difficulty of the question and preferred to decide it only after there had been an interval in which courts and legal scholars might have ample time to weigh the pros and cons. We find nothing to the contrary in the quotations from *Mapp* in Judge Marshall's dissenting opinion herein, including the reference to footnote 9.

As we have concluded that the question has been held open and that the expression of our views will be welcomed, we have filed this opinion although fully aware of the fact that certiorari has been granted in *Linkletter*.

### II. THE PHILOSOPHICAL ASPECT OF THE CASE

There are two arguments supporting the view that we have no alternative other than to give general retroactive effect to the exclusionary rule. The first stems from the Blackstonian theory, recently described by this Court as "the splendid myth of 'discovered law,' 1 Blackstone, Commentaries, 70." *Durocher* v. *LaValle*, 2 Cir., 1964, 330 F. 2d 303, at page 312.

The argument is advanced, on these premises, that one and only one interpretation of the Fourteenth Amendment is correct for all times and, as the most recent interpretation would be the most authoritative, the rule of *Wolf* v. *Colorado*, permitting the admission of unlawfully seized evidence, never was law; whereas the rule of *Mapp* v. *Ohio*, [391] requiring the exclusion of such evidence, has always been the law. Accordingly, petitioner would have us conclude that he is entitled to the writ on the ground that, at the time of his trial, the admission of the search and seizure evidence violated the Constitution.

This theory has been repeatedly criticized (see, e.g., Cardozo, *The Nature of the Judicial Process* (1921); Levy, *Realist Jurisprudence and Prospective Overruling*, 1960, 109 U. Pa. L. Rev.

1; Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 1962, 71 Yale L. J. 907; see also Snyder, *Retrospective Operation of Overruling Decisions*, 1940, 35 Ill. L. Rev. 121) and we think the time has come to reject it. See *United States ex rel. Linkletter* v. *Walker*, supra, 1963, 323 F. 2d 11; *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 1932, 287 U.S. 358; *Chicot County Drainage District* v. *Baxter State Bank*, 1940, 308 U.S. 371. In any realistic view of the case before us, the law, both state and federal, at the time of the trial of Angelet made admissible the evidence procured by the unreasonable search and seizure. For that reason we cannot construe Angelet's failure to object to the evidence as a waiver.

The other argument is, we are here dealing with a constitutional question, and we have no alternative other than to give the new doctrine the widest possible scope. It is pointed out that where constitutional rights are violated prejudice is presumed.[1] It is our view, however, that the development of constitutional law calls into play precisely the same operations of the judicial process as does the development of a body of decisional law in any other field. The extent to which the new doctrine is to be applied should [392] depend, in the language of Mr. Justice Cardozo, upon "considerations of convenience, of utility, and of the deepest sentiments of justice." *United States ex rel. Linkletter* v. *Walker*, *supra*, 5 Cir., 1963, 323 F. 2d 11, footnote 5, cert. granted, 1964, —— U.S. ——, 32 U.S.L. Week 3400. There is no rule of thumb, nor should there be. It is the burden of this opinion to attempt to demonstrate that, by Mr. Justice Cardozo's test, the *Mapp* v. *Ohio* doctrine should not be given general retroactive effect.

As we view the problem, there is now at stake one of the most important principles of constitutional interpretation. It has been the proud boast of the most distinguished of our American jurists that the federal Constitution, and especially the Bill of Rights, including the Fourteenth Amendment, is not a rigid aggregation of fundamental rules but a dynamic and flex-

[1] See *United States* v. *Plattner*, 2 Cir., 1964, 330 F. 2d 271, 273; *Coplon* v. *United States*, D.C. Cir., 1951, 191 F. 2d 749, 758–60, cert. denied, 1952, 342 U.S. 926; *Fina* v. *United States*, 10 Cir., 1931, 46 F. 2d 643.

ible document, to be interpreted from time to time to conform to the social and economic needs of a changing society in a modern world. See, e.g., *Brown* v. *Board of Education*, 1954, 347 U.S. 483 (Mr. Chief Justice Warren); *United States* v. *Classic*, 1941, 313 U.S. 299, 315–16 (Mr. Justice Stone); *Olmstead* v. *United States*, 1928, 277 U.S. 438, 471–79 (Mr. Justice Brandeis dissenting); *Gompers* v. *United States*, 1914, 233 U.S. 604, 610 (Mr. Justice Holmes); *Weems* v. *United States*, 1910, 217 U.S. 349, 373–74 (Mr. Justice McKenna); *McCulloch* v. *Maryland*, 1819, 17 U.S. 316, 407, 415 (Mr. Chief Justice Marshall); *Martin* v. *Hunter's Lessee*, 1816, 14 U.S. 304, 326–27 (Mr. Justice Story). We shall return to this subject later.

We do not doubt the power of the judicial establishment to decide that the doctrine of *Mapp* v. *Ohio* is to be given general retroactive effect, or to decide that it is not to be given general retroactive effect. There is no philosophical [393] obstacle to a decision either way. But there must be a rational basis for that decision.

We proceed to come to grips with the heart of the problem as best we may, and all too conscious of the fact that we may have been misled by the marks we have found to guide us.

### III. THE PRIMARY REASON FOR THE DECISION IN MAPP V. OHIO WAS TO DETER ILLEGAL SEARCHES AND SEIZURES IN THE FUTURE

Basic to the application of *Mapp* v. *Ohio* to other situations, such as the one now before us, is the ascertainment of the reasons behind the decision. The principal reason, we think, is disclosed not only on the face of the opinions in *Mapp* v. *Ohio*, but in what appears on the face of the opinions written in the series of cases leading up to the holding in *Mapp* v. *Ohio* and this principal reason is to deter police misconduct. It thus removes the incentive to violate the Constitution in just those proceedings in which the outcome is of special interest to the officials who would conduct or direct an illegal search.

As the rule of *Mapp* v. *Ohio* is essentially an extension of the rule of *Weeks* v. *United States*, 1914, 232 U.S. 383, under which evidence seized in violation of the Fourth Amendment was

excluded from federal criminal trials, we think it relevant to consider Judge Learned Hand's succinct summary of the purpose of the rule.

> "As we understand it, the reason for the exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In earlier times the action of trespass against the offending official may have been protection enough; but that is true [394] no longer. Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be repressed." *United States* v. *Pugliese*, 2 Cir., 1945, 153 F. 2d 497, 499.

State courts which rejected the common law rule of admissibility and adopted the exclusionary rule prior to the decision of the Supreme Court in *Mapp* v. *Ohio* placed similar emphasis on the deterrent rationale. For example, Justice Traynor, in a scholarly analysis written for the Supreme Court of California in the landmark case of *People* v. *Cahan*, 1955, 282 P. 2d 905, declared that the court was "compelled" to reach the conclusion that evidence obtained in violation of the constitutional guarantees is inadmissible

> "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.
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> * * * * * *
>
> "Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives." 282 P. 2d 905, at 911–12, 913.

In a similar vein, the Criminal Court of Appeals of Oklahoma expressed its views as follows:

> [395] "If these government agencies, contrary to the letter and the spirit of our Constitution, are encouraged or condoned by the courts in their invasion of the privacy of homes, offices and places of business, forcibly and without invitation, for the purpose of procuring evidence to convict one of some misdemeanor, the practice followed to its logical conclusion will make our vaunted freedom a mere pretense, valueless, and without substance. Whenever the courts actively encourage officers to procure evidence illegally by force, the officers soon become dictatorial, arrogant, and even brutal—a natural consequence of the courts' approval of obtaining evidence illegally by force." *Gore* v. *State*, 1923, 218 Pac. 545, 550.

In *State* v. *Owens*, 1924, 259 S.W. 100, the Supreme Court of Missouri summed up its reason for excluding evidence obtained in an illegal search in the following sentence:

> "The question is not whether the defendant can be redressed in his case upon trial, but whether the reckless officer may be encouraged by the approval of the court to repeat the trespass." 259 S.W. at 109.

The most authoritative source from which we derive our understanding of the decision in *Mapp* v. *Ohio* is, of course, the Supreme Court of the United States. In *Wolf* v. *Colorado*, 1949, 338 U.S. 25, the Supreme Court made it clear for the first time that "the core of the Fourth Amendment" is applicable to the States through the due process clause of the Fourteenth Amendment. Nevertheless, the Supreme Court was reluctant to read the federal exclusionary rule into the minimal requirements of the Fourteenth Amendment until those States which admitted unlawfully seized evidence had been allowed an opportunity to adopt the exclusionary rule or develop other methods of effectively [396] enforcing the right of the people to be secure against arbitrary intrusions into their privacy by the police. See *Irvine* v. *California*, 1954, 347 U.S. 128; also *Monroe* v. *Pape*, 1961, 365 U.S. 167.

Not until the experience of California, as well as that of other States, had demonstrated that alternative criminal and civil remedies "have been worthless and futile," 367 U.S. at 652, did the Supreme Court, in *Mapp* v. *Ohio*, finally impose the exclusionary rule on the States as a constitutional mandate. In the *Mapp* opinion itself, the Supreme Court repeated the language it had used in *Elkins* v. *United States*, 1960, 364 U.S. 206, 217, stating "that the purpose of the exclusionary rule 'is to deter—compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" 367 U.S. at 656. Mr. Justice Harlan, in his dissenting opinion, agreed that the exclusionary rule as applied in the federal courts under the doctrine of *Weeks* v. *United States*, *supra*, 1914, 232 U.S. 383, "is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future." 367 U.S. at 680. Again, in *Fahy* v. *Connecticut*, *supra*, 1963, 375 U.S. 85, at page 94, Mr. Justice Harlan, joined by Mr. Justice Clark, Mr. Justice Stewart, and Mr. Justice White, the only members of the Court to reach the issue of whether the admission of unconstitutionally seized evidence could be regarded as harmless error where it did not affect the outcome of the trial, reaffirmed the view that the basis of the *Mapp* rule lies in its "*prophylactic* function" of preventing prosecutors from using unconstitutionally obtained evidence to secure a conviction.[2]

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[2] We do not believe that the exclusionary rule of *Mapp* v. *Ohio* is based on the right not to be a witness against oneself in a criminal trial. Nearly two months prior to the decision in *Mapp* v. *Ohio*, the Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan, in dissenting opinions, clearly had taken the position that the Fifth Amendment privilege against self-incrimination is included within the due process clause of the Fourteenth Amendment. See *Cohen* v. *Hurley*, 1961, 366 U.S. 117, 131–60. Yet only Mr. Justice Black relied on incorporation of the Fifth Amendment into the Fourteenth Amendment to support the decision in *Mapp* v. *Ohio*. The Chief Justice, Mr. Justice Douglas, who also concurred in a separate opinion, and Mr. Justice Brennan joined in the opinion of Mr. Justice Clark and placed no reliance on the Fifth Amendment.

Similarly, Mr. Justice Murphy and Mr. Justice Rutledge, who had both previously taken the position that the Fifth Amendment is incorporated in the Fourteenth Amendment, see *Adamson* v. *California*, 1947, 332 U.S. 46, 123–25, did not rely on the Fifth Amendment right in their dissenting opinions in *Wolf* v. *Colorado*. Instead, they asserted that the exclusionary

[397] Having thus concluded that the course of decision in the Supreme Court demonstrates that the primary purpose of the exclusionary rule is to deter searches and seizures that violate the Fourteenth Amendment, as construed with the Fourth Amendment, we think this purpose is sufficiently, if not completely, served by refusing to apply the rule to searches and seizures long prior to the decision in *Mapp* v. *Ohio* or the occurrences involved in that case. *United States ex rel. Linkletter* v. *Walker*, *supra*, 5 Cir., 1963, 323 F. 2d 11, cert. granted, 1964, —— U.S. ——, 32 U.S. L. Week 3400; Bender, *The Retroactive Effect of an Overruling Decision: Mapp* v. *Ohio*, 1962, 110 U. Pa. L. Rev. 650; Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962, Duke L. J. 319.

[398] IV. THE STATE OF NEW YORK HAS A LEGITIMATE INTEREST IN THE EXECUTION OF A JUDGMENT BASED UPON EVIDENCE NOT FOUND TO BE UNTRUSTWORTHY AFTER A TRIAL NOT TAINTED BY ANY FUNDAMENTAL UNFAIRNESS

The rationale of *Mapp* v. *Ohio*, as we see it, is that a State will no longer be permitted to employ a procedure that is harmful to the security of the community at large because it fosters an incentive to the police to conduct unreasonable searches and seizures in violation of established principles of constitutional law. It is noteworthy that the new exclusionary principle does not arise out of any claim that the evidence that was admitted is untrustworthy or that the trial was tainted by some fundamental unfairness in regard to the interests of the particular defendant. Indeed, the compact logic of Judge Kaufman's

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rule, because of its deterrent function, is necessarily a part of the Fourth Amendment and therefore binding on the States through the Fourteenth Amendment.

The reason would seem to be that "the sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the * * * Government to compel incriminating testimony * * * to convict a man out of his own mouth." *Knapp* v. *Schweitzer*, 1958, 357 U.S. 371, 380.

Thus, even if the Supreme Court were to hold that the Fourteenth Amendment prohibits the States from compelling an individual to be a witness against himself, and even if that decision were held to be retroactive, we do not believe such a decision would govern the question of the retroactivity of *Mapp*.

opinion in *Durocher* v. *LaVallee*, 2 Cir., 1964, 330 F. 2d 303, points up the difference between giving retroactive effect to *Gideon* and giving retroactive effect to *Mapp*.[3]

[399] As the interests of society that the rule of *Mapp* v. *Ohio* is designed to protect are not advanced by general retroactive application of the rule, we think it proper to accord fair weight to the interest of society in effective enforcement of the criminal law. A review of the trial minutes confirms that there is no reasonable doubt that Angelet is guilty of the serious crime for which he was convicted. In the absence of any fundamental unfairness to the defendant, or doubt as to the reliability of the evidence admitted, it seems clear that the People of the State of New York have a definite and legitimate interest in seeing that the sentence imposed upon him is fully executed.

Moreover, the effect of a ruling that the exclusionary rule affects all past convictions based upon evidence illegally procured is likely to be chaotic. See *Warring* v. *Culpoys*, D. C. Cir., 1941, 122 F. 2d 642, 647, cert. denied, 314 U. S. 678. For example, as such evidence was freely admissible in New York, pursuant to rulings of the Supreme Court, in how many of such convictions did the prosecution rely solely upon the evidence illegally procured, with perhaps some corroboration, without offering other incontrovertible proofs, not now available due to

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[3] Footnote 3 on page 310 of *Durocher* reads:

"In determining whether a decision is to be retroactively applied, commentators have often suggested a test based on whether the underlying 'purpose' of that decision would be served thereby. See, *e.g.*, Comment *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962). Under such an analysis, for example, a distinction might be drawn between *Gideon* and a case such as *Mapp* v. *Ohio*, 367 U.S. 643 (1961). It might be argued, in this regard, that the exclusionary rule of *Mapp* is not designed to protect the 'fairness' of the actual trial, but rather to serve as a deterrent to oppressive police conduct. If this is true, it might be maintained that *Mapp* has less of a claim to retroactive application than does *Gideon*, since *Mapp* could hardly be expected to 'deter' searches which took place prior to the date of its decision. See *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963). It is not now necessary to express any view as to the validity of this sort of analysis, and we expressly disclaim any intention here to decide whether *Mapp* is to be retroactively applied. Considerations of this sort do, however, indicate that *Gideon* and *Mapp* present quite different questions, and that a holding that the former is retroactive by no means compels a similar result when the latter issue is before us."

the death of witnesses or other circumstances, because such proofs would have been merely cumulative?

We have grave doubt that a proper deference to the general control of a State over the administration of the criminal laws warrants such intrusion into the past, where there is no reason to doubt that the guilty have been brought to book and the trial leading to the conviction was based upon no fundamental unfairness such as exists in those cases where the right of defendants to counsel has been [400] infrfnged or coerced confessions have been received in evidence. In such cases "an insistence that a defendant establish the extent of prejudice which he has suffered would obviously be futile." *United States* v. *Guerra*, 2 Cir., Docket No. 27792, June 5, 1964, pp. 2288–2289, n. 4.

### V. A HOLDING OF GENERAL RETROACTIVITY WOULD SERIOUSLY IMPAIR THE FURTHER DEVELOPMENT OF CONSTITUTIONAL LAW ON THE SUBJECT OF ILLEGAL SEARCHES AND SEIZURES

The right to privacy, and the development of new and much needed interpretations of the Fourth and Fourteenth Amendments, is one of the most pressing social problems of modern times in America. See generally Packard, *The Naked Society* (1964). It is not too much to say that wiretapping and electronic eavesdropping have become so widespread and are so ingeniously contrived that new and perhaps far-reaching rulings will be made regulating such matters in the not too distant future. The whole subject of illegal searches and seizures is in such a state of vagueness and confusion that it has been stated that law enforcement officers have few sure guides and are at a loss to know what they may lawfully do and what they may not lawfully do. Lumbard, *The Administration of Criminal Justice*, 1963, 49 A.B.A.J. 840, 842.

If it is to be held that the exclusionary rule of *Mapp* v. *Ohio* is to be given general retroactive effect, how is a similar holding to be withheld with respect to every new interpretation of the Fourth and Fourteenth Amendments? Indeed, the basic reasoning of the dissent in this case is to the effect that *any* change in constitutional interpretation *must* be given retro-

active effect. Such a rule would add rigidity to a decisional process that traditionally over [401] the years has been flexible, and would thus inevitably to some extent postpone the much needed further development of constitutional law on a subject so close to the hearts of the people. Moreover, it cannot be assumed that all overrulings of prior decisions will be of such a character as to provide a basis for new trials and possible reversals of convictions in criminal cases. Suppose, for example, the rule of exclusion now under consideration were to be changed later by the overruling of *Mapp* v. *Ohio*, how could such a holding be given retroactive effect, if in the meantime large numbers of persons previously convicted under the rule admitting such evidence had been released?

In other words, the drawing of lines of distinction between different types of cases seems to us to be of the essence of the judicial process.* The word "constitutional" is not to be given some talismanic effect, irrespective of consequences. In *Gideon* the proceedings leading to conviction were tainted with an infringement of rights of the defendant so serious as to demonstrate that these proceedings were essentially unfair and hence could not and did not meet the requirements of due process of law. The reasoning of Judge Kaufman in the *Durocher* opinion makes this as clear as crystal. In the case now before us there is no such taint of essential unfairness.

With due respect for the views of our brothers of the Third Circuit, we do not agree with Judge Hastie's dictum in *United States ex rel. Craig* v. *Myers*, 3 Cir., 1964, 329 F. 2d 856, 859, quoted in Judge Marshall's dissent herein. [402] The result arrived at in *Myers* is the same as the one we reached in *Durocher*, but the dictum, as we read it, does no more than restate in different words the Blackstonian theory that we have already rejected.

In conclusion, there are certain general policy considerations that we think make it generally undesirable to give retro-

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*The lines of demarcation drawn between cases at the periphery of any rule may frequently appear to be somewhat arbitrary. Nevertheless, in our opinion, the fact that the mitigating considerations, discussed in the Preliminary Comment of this opinion, that favored applying the *Mapp* rule in *Ker*, *Fahy* and *Stoner* are absent in *Angelet* provides a rational basis for distinguishing those cases.

active effect to overruling decisions, except under the most compelling circumstances. It has for generations been part of the formulary of *stare decisis* and *res judicata* to leave the history of the past undisturbed and to sustain the finality of judgments long since recorded. This is due in no small measure to the fact that witnesses die, documentary and other proofs are destroyed or otherwise become unavailable, and to retroactive application of overruling decisions involves of necessity an unequal and discriminatory result in individual cases. Added to this is the burden on judicial administration. True, the added burden must be borne in cases where old convictions are the fruit of trials tainted by some fundamental unfairness within the orbit of constitutional law, but not, we think, in cases such as the one we now decide.

The order below is affirmed.

MARSHALL, *Circuit Judge* (with whom SMITH, *Circuit Judge*, concurs), dissenting:

I respectfully dissent. I cannot, and as I read the opinion in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), we may not restrict its application to illegal searches and seizures, or convictions based upon illegally seized evidence, occurring after that decision. "It is significant that the Supreme Court did not specifically declare that the effect of its decision was to operate only in the future, as it might have done." *Hall* v. *Warden*, 313 F. 2d 483, 496 (4 Cir. 1963). [403] We are not free to circumscribe the application of a declared constitutional right.

The majority finds "the search and seizure was illegal and an invasion of Angelet's constitutional rights." There is no question of the jurisdiction of the trial court and this court to pass upon the merits of the petition. Why, then, should not this conviction based upon evidence admittedly obtained by an invasion of petitioner's constitutional rights, be subject to the usual form of post-conviction relief? *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Fay* v. *Noia*, 372 U.S. 391 (1963). I believe it should, for the reasons set out below.

The scholarly majority opinion cites and discusses everything from Blackstone to Cardozo, from state court cases to a

Learned Hand opinion to occasional expressions in other opinions of the Supreme Court in its philosophical quest for the elusive "purpose" of the exclusionary rule set out in *Mapp*. By contrast, I believe that the starting point of the inquiry must be the text of the *Mapp* opinion. And I believe that a careful examination of that text will show two things: first, that the exclusionary rule, whatever its supposed "purpose," is a fundamental constitutional guarantee and personal right of an accused and second, that the Supreme Court considered the issue of retroactivity and did not shrink from it.

The majority opinion in *Mapp* v. *Ohio* concluded:

> The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer [404] permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself chooses to suspend its enjoyment. Our decision, founded on reason and truth, *gives to the individual no more than that which the Constitution guarantees him*, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. 367 U.S. at 660. (Emphasis added.)

The majority opinion is premised upon the proposition that the primary reason for the *Mapp* decision was to deter illegal searches and seizures in the future. This premise completely ignores the actual effect of *Mapp* in overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949). The *Mapp* decision declared and defined constitutional right of a defendant not to be convicted upon illegally seized evidence. All the arguments concerning the deterrent effect inherent in cases following *Weeks* v. *United*

*States*, 232 U.S. 383 (1914) were discussed by Mr. Justice Clark in *Mapp*. After this discussion he recognized the constitutional right involved and stated:

> Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado, supra*, at 27. This Court has not hesitated to enforce strictly [405] against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers* v. *Richmond*, 365 U.S. 534 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram* v. *United States*, 168 U.S. 532, 543–544 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman* v. *United States*, 322 U.S. 487, 489–490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other

> in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. *Rochin* v. *California*, 342 U.S. 165, 173 (1952). 367 U.S. at 656–657.

The simple fact is that, in the view of the Supreme Court, the right not "to be convicted on unconstitutional evi- [406] dence," is a fundamental ingredient of the due process of law guaranteed state criminal defendants by the 14th Amendment to the Constitution of the United States. However, the majority in this case, by focusing almost exclusively on a supposed "purpose" which it attributes to the exclusionary rule has obscured this basic point.

Again looking to the text of the *Mapp* opinion, which the majority scarcely mentions, we find footnote 9, at 372 U.S. 659:

> As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U.S. 252, *Griffin* v. *Illinois*, 351 U.S. 12, and *Herman* v. *Claudy*, 350 U.S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

Two points are unmistakably clear about this footnote. First, the likelihood of retroactive application was clearly before the Court. Otherwise why cite such cases as *Burns*, *Griffin* and *Herman*, which would "affect" state convictions only if they were given retroactive effect? Second, to the extent that the footnote conditions application of the new doctrine on State procedural grounds, it no longer represents the law. *Fay* v. *Noia*, 372 U.S. 391 (1963). Thus, the only real comfort for the majority comes from the use of the word "possibly." But this may refer to a number of matters, e.g., the state procedural

grounds discussed above, or the possibility that few convictions were in fact obtained [407] by use of unconstitutionally seized evidence, which would tend to limit the *Mapp* holding's effect on existing convictions without impairing its retroactivity under other conditions. I believe that footnote 9, taken in context, reflects an intention that the rule of the case be applied to past as well as future convictions.

Next to the *Mapp* opinion itself, the most authoritative source of guidance is what the Court has done in similar situations. Without exception, retroactive application has been given to the principles of constitutional law developed over the years. Only a few months ago, as we pointed out in *U.S. ex rel. Durocher* v. *LaVallee*, 330 F. 2d 303 (1964), the Supreme Court reversed a 1959 Ohio conviction, based on a guilty plea entered without counsel, on the basis of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). *Doughty* v. *Maxwell*, 376 U.S. 202 (1964). See also *House* v. *Mayo*, 324 U.S. 42 (1945). Again, in *Eskridge* v. *Washington State Board of Parole*, 357 U.S. 214 (1958) the Court applied *Griffin* v. *Illinois*, 351 U.S. 12 (1956) involving the right of an indigent to a transcript for the purpose of taking an appeal without payment of fees, to a 1935 conviction.[1] See also *Burns* v. *Ohio*, 360 U.S. 252 (1959); [408] *Douglas* v.

[1] It is true that in *Norvell* v. *Illinois*, 373 U.S. 420 (1963), the Court affirmed a decision of the Illinois Supreme Court that denied an indigent prisoner a transcript of his 1941 trial, where the court reporter had died in the interim and it was impossible to transcribe his notes or reconstruct the evidence from the testimony of witnesses. The prisoner had a lawyer at his trial, who did not pursue an appeal, and was apparently not requested to do so at that time. The Court's decision was based on the narrowest possible ground, saying that "where transcripts are no longer available, Illinois may rest on the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal." Mr. Justice Goldberg, for himself and Mr. Justice Stewart, dissented. They believed that the Illinois state court erred in holding that *Griffin* operated "prospectively and not retroactively, in the sense that it invalidated only 'existing financial barriers' to appeal." Thus, that court did not reach the question whether Griffin had been deprived of his constitutional rights in 1941. The dissenters urged that, although the majority opinion did not go off on this analysis, the case should nevertheless be remanded for reconsideration in the light of the correct interpretation of *Griffin*, which was that it was fully retroactive. "Griffin was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments." 373 U.S. at 425.

*Green*, 363 U.S. 192 (1960); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Lane* v. *Brown*, 372 U.S. 483 (1963).*

The Supreme Court has also given retroactive application to the increasingly stringent tests employed by it in evaluating the voluntariness of confessions. In *Reck* v. *Pate*, 367 U.S. 433 (1916), the court ordered the release of Reck, a prisoner convicted in 1937, when it found that the circumstances of obtaining a confession were inherently coercive in the light of such cases as *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) and *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949), all of which were decided many years after Reck's trial. Indeed, the District Court which held a hearing on Reck's petition recognized that, under the present-day standards expounded in the above and other cases, the confession would have to be excluded, but declined to apply those cases retroactively. See *United States ex rel. Reck* v. *Ragen*, 172 F. Supp. 734, 747 (N.D. Ill. 1959). The Supreme Court's opinion did not even allude to the problem of retroactivity.

The confession cases are a particularly persuasive analogy, not only because of their discussion in the *Mapp* opinion, but also because in them, as in the cases arising under the *Mapp* decision, there is often no doubt whatever of the defendant's guilt. The traditional basis for excluding confessions obtained under duress may have been their [409] unreliability. But if any principle is clear in this area, it is that the presence of corrobative independent evidence of guilt should have no bearing on the federal court's consideration of the issue of coercion in a habeas corpus proceeding. See *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Rogers* v. *Richmond*, *supra*.

The only distinction between the confession cases and the one before us is that the former did not involve overruling prior precedents. But this is a distinction which makes no difference. Surely the state cannot here claim any "good faith reliance" on the *Wolf* doctrine. It was on notice, at Angelet's

* The Supreme Court has applied the exclusionary rule to three cases which involved the legality of searches conducted before the date of the decision in *Mapp*. *Stoner* v. *California*, 376 U.S. 483 (1964); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); *Ker* v. *California*, 374 U.S. 23 (1963).

trial, that the narcotics introduced into evidence had been seized in violation of the defendant's constitutional rights under the Fourteenth Amendment. It was on notice that the Supreme Court did not condone this procedure, and looked to the states to provide adequate corrective process. It was on notice that no such process had been provided.

But even if we assume that some importance should be accorded the fact that *Mapp* was an overruling decision, we must still weigh the interest of the state in relying on the *Wolf* decision at this time against the interest of the petitioner in not being confined under a judgment secured through the use of unconstitutional evidence. We now know that Angelet's trial was tainted by error of constitutional dimensions, although this was not known at the time. He is still suffering the consequences of that error—deprivation of his liberty. The writ of habeas corpus is available as a means of rectifying that deprivation. As Judge Hastie well stated, in the recent case of *United States ex rel. Craig* v. *Myers*, 329 F. 2d 856, 859 (3 Cir. 1964):

> In actuality, all criminal convictions, all appellate judgments reversing convictions, and most notably, all [410] judgments sustaining collateral attacks on convictions impose legal consequences upon the basis of the court's present legal evaluation of past conduct. It is irrelevant that the judge's views of what constitutes a denial of due process may have changed since the occurrence of the events in suit, or that he or some other judge might have rendered a different decision had the same matter reached his court years earlier. The petitioner is entitled to the most competent and informed decision the judge can now make whether there was fundamental unfairness in his past conviction. Our system is not so unenlightened as to require that in attaching present consequences to 1931 occurrences, a judge must ignore all of the insight that men learned in the law and observant of human behavior have acquired concerning the essentials of tolerable criminal procedure during the past 30 years.

I do not believe it is possible to draw lines between the several constitutional rights guaranteed by the 14th Amendment as interpreted by the Supreme Court of the United States. How can the right not to be convicted on unconstitutionally seized evidence not be deemed "fundamental," when the Court was willing to overrule a prior decision to establish it? The majority provides no satisfactory answer.

Moreover, I believe that the thrust of the *Craig* case, which, to put the matter quite baldly, requires a federal judge acting on a petition for habeas corpus to judge the constitutional validity of a state prisoner's confinement by assuming that the trial was held on the very day that he is considering the petition, is a necessary implication of *Fay* v. *Noia*, 372 U.S. 391 (1963). I might note first that this decision will doubtless result in the release of far more [411] state prisoners than those entitled to relief under *Mapp*. The "adequate state ground" doctrine was unquestionably the largest single limitation on federal ha' corpus relief, and it no longer exists. It was destroyed because of the Court's belief that a forum must be provided for the vindication of constitutional claims.

> The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice . . . It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that res judicata is inapplicable in habeas proceedings . . . is really but an instance of the larger principle that void judgments may be collaterally impeached. . . . So also, the traditional characterization of the writ of habeas corpus as an original . . . remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that a state criminal judgment resting on a constitutional error is void for all purposes. But conventional notions of

> finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. *Fay* v. *Noia*, 372 U.S. at 422–423.

To be sure, *Fay* v. *Noia* did not directly involve the question of retroactive application of substantive principles of constitutional law, as distinguished from the pro-[412]cedural mechanisms whereby they may be asserted.[*] But if the federal writ of habeas corpus is to issue to redress a constitutional deprivation and terminate a detention despite the fact that state procedures could have been employed, then I can see no reason for declining to issue the writ where, during the course of a detention, it becomes clear that fundamenal error was committed at the trial. The Court in *Noia* focussed almost exclusively on the fact of deprivation of liberty, and insisted that the federal courts be at all times prepared to restore liberty if the circumstances warranted.

A final practical difficulty with the majority approach to this case is that it presents the courts with the necessity of fixing an arbitrary date when the *Mapp* rule must begin to take effect. If the "deterrence" rationale is followed in all its implications, then *Mapp* should apply only to convictions involving evidence seized after the date of its decision. As the majority recognizes, *Ker* v. *California*, 374 U.S. 23 (1963); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963) and *Stoner* v. *California*, 376 U.S. 483 (1964), preclude this result. If a state court

[*] It is noteworthy, however, that in footnote 35 of the *Noia* opinion, Mr. Justice Brennan cast doubt on the precedential importance of *Sunal* v. *Large*, 332 U.S. 174 (1947), which held that a prisoner who did not appeal his conviction for violation of the Selective Training and Service Act, might not obtain habeas corpus. The trial court there had held that no challenge to validity of the defendant's classification might be lodged at trial, a position later rejected by the Supreme Court. Mr. Justice Brennan noted that the *Sunal* opinion "expressly excluded errors so grave that they cross the jurisdictional line . . . and implied that the claimed error was not even of constitutional dimension." He then cross-referred to previous pages in the opinion which noted the habeas relief has often been denied "upon allegations merely of error of law and not of a substantial constitutional denial" and that "such decisions are not however authorities against applications which involve the historic office of the Great Writ to redress detention in violation of fundamental law."

should nevertheless admit such evidence in a post-*Mapp* trial, no one could possibly contend that federal habeas corpus would not lie. The same [413] three cases also indicate that, even as to pre-*Mapp* convictions, *Mapp* must be applied by state appellate courts which review such convictions after the decision, a result that does not in any way further "deterrence." To this extent, the purity of the majority's "ideal" view of *Mapp* has necessarily been compromised.

Next comes the question, already before this court, of an affirmance before *Mapp* but a petition for rehearing of the appeal afterward. If the petition is timely filed and denied, can there be much doubt that the *Mapp* issue is open on habeas corpus? Then, too, suppose that a defendant had lost his appeal in an intermediate state court and sought discretionary review in the highest court after *Mapp* came down. If this is refused, is the prisoner entitled to federal habeas corpus relief? If yes, should it really matter whether the order came on the Friday before *Mapp* was handed down, or the Tuesday afterward? Still other variations on the theme are possible, but I do not think it necessary to set them out. The point is simply that, under the majority approach, assertion of fundamental rights will depend on strained distinctions and accidents of timing which, I submit, have no place in the orderly administration of law.

Alternatively, the majority seems to suggest that convictions based on evidence illegally seized on or after the seizure date in *Mapp*, May 13, 1957, would be subject to habeas corpus relief but convictions on evidence illegally seized prior to that date would be immune. "... We think this purpose is sufficiently, if not completely served by refusing to apply the rule to seizures long prior to the decision in *Mapp* v. *Ohio* or occurrences involved in that case . . ." To make the constitutional rights of prisoners throughout the nation depend on when three Cleveland police officers happened to conduct a routine investigation, [414] rather than on what the Supreme Court has said and done, is, to me at least, the height of unreason.

It may be objected that these problems do not arise in this particular case. But they are present in several appeals now pending in this very court, and are undoubtedly involved in

many habeas corpus petitions now in the district courts of this and other circuits. I submit that the effect of the majority decision will be only to confuse the issues further. I believe we should say here, as we did in *Durocher, supra*, "against such casuistry, we hasten to add our simple point: Constitutional rights should not depend on arcane logic or trivial events." 330 F. 2d 303, 310 n. 4.

The majority here puts its greatest stress on the alleged interest of the State of New York in insisting on Angelet serving his sentence and fears of other convicted criminals being released. Constitutional rights are personal and may not be so conditioned or balanced away. New York's interest in enforcing its criminal laws is limited by the Constitution of the United States. At least since *Wolf* v. *Colorado, supra*, New York has been on notice that evidence of the type used to convict Angelet was illegally seized in violation of his constitutional rights. This evidence was knowingly introduced by the State. The judgment based upon this illegally seized evidence was pronounced by the State. The State has refused to correct this. After *Mapp* there is clearly no constitutionally recognized interest of the State of New York to continue this illegal detention of Angelet. Why is the conviction of Angelet any more immune from attack than the conviction of Miss Mapp? Perhaps the answer is suggested by the majority's argument in favor of *stare decisis* and *res judicata*. However, to hold that habeas corpus is available to challenge a conviction based on illegally seized evidence in violation of constitutional rights would actually be an application of *stare decisis*, for the reasons set out above. "Moreover, our [415] holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." *Mapp* v. *Ohio*, 367 U.S. at 657.

I would reverse the judgment below and direct the writ to issue, subject to the right of the State to order an immediate retrial of the prisoner if it be so advised.

[416] In United States Court of Appeals for the Second Circuit

Present: Hon. J. Edward Lumbard, *Chief Judge*; Hon. Harold R. Medina, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, *Circuit Judges*.

United States ex rel. George Angelet, relator-appellant

*v.*

Edward M. Fay, as Warden of Green Haven State Prison, Stormville, New York, respondent-appellee

*Judgment — June 11, 1964*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
*Clerk.*

[417] [File endorsement omitted]

[418] [Clerk's certificate to foregoing transcript omitted in printing:]

Supreme Court of the United States No. 212 Misc., October Term, 1964

GEORGE ANGELET, PETITIONER

*vs.*

EDWARD M. FAY, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

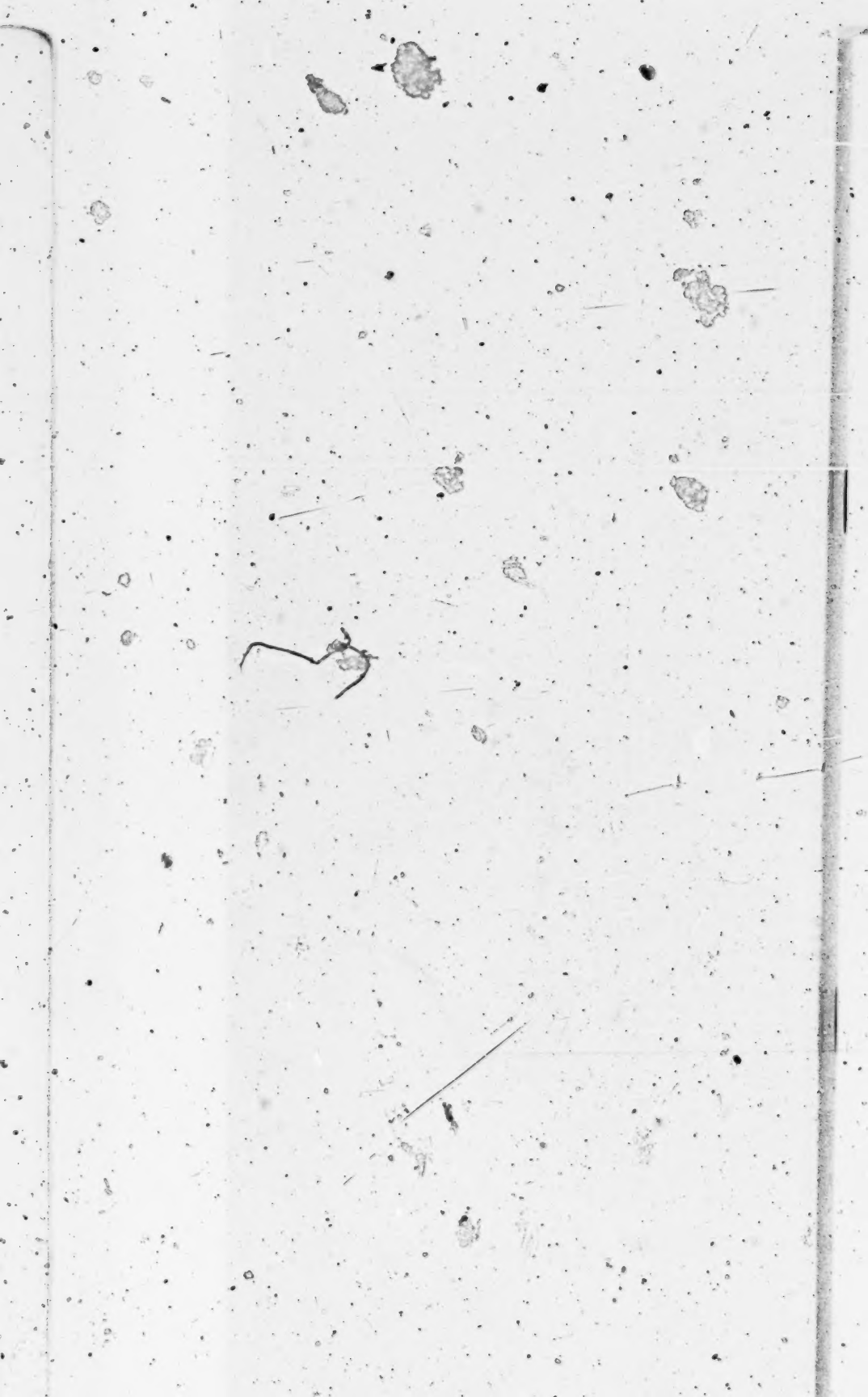
[419] *Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—October 12, 1964*

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 578 and placed on the summary calendar for oral argument immediately following No. 95.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

OCTOBER 12, 1964.

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

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## No. 578

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GEORGE ANGELET,

*Petitioner,*

—against—

HON. EDWARD M. FAY, as Warden of Green Haven State Prison,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR PETITIONER

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

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## No. 578

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GEORGE ANGELET,

*Petitioner,*

—against—

HON. EDWARD M. FAY, as Warden of Green Haven State Prison,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR PETITIONER

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### Opinions Below

The opinions of the United States Court of Appeals for the Second Circuit are reported at 333 F. 2d 12 and appear in the Record at R. 257, The opinion of the United States District Court for the Southern District of New York (Hon. Edmund L. Palmieri, *D.J.*) is not reported and is set forth at R. 249.

### Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on October 12, 1964.

## Questions Presented

### I

Whether federal habeas corpus lies on behalf of a state prisoner who is now in custody pursuant to a judgment secured solely through evidence obtained in violation of the Constitution and used to secure conviction at a time when the state evidentiary rule permitted the use of such evidence and no effective federal remedy existed.

### II

Whether decisions of this Court interpreting the Constitution are to be given retrospective operation.

### III

Whether the participation by federal officers in the illegal search and seizure entitles Petitioner to habeas corpus relief regardless of the applicability of *Mapp* v. *Ohio*.

## Constitutional and Statutory Provisions Involved

AMENDMENT IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • •

AMENDMENT XIV

> • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2241

. . .

(c) The writ of habeas corpus shall not extend to prisoner unless

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

## Statement of the Case

### *The State Proceedings*

George Angelet was tried before Judge Jonah Goldstein and jury in the former Court of General Sessions, New York County in January 1951. and convicted of possession of narcotics with intent to sell (Penal Law, §1751). He was sentenced on February 27, 1951, to ten to twenty years imprisonment, which sentence is presently being served in the custody of the Respondent. A notice of appeal to the Appellate Division, First Judicial Department was filed, but the appeal was dismissed in March of 1952 (112 N.Y.S. 2d 317).

In August 1961, the Petitioner applied to the Court of General Sessions by way of a motion in the nature of writ of error coram nobis in which it was claimed that the conviction was obtained by the use of evidence seized in violation of the Fourth and Fourteenth Amendments. The application was denied without hearing or examination of the trial record, the Court (Davidson, *J.*), "conceding *arguendo* that the evidence which resulted in petitioner's conviction was obtained as the result of an unlawful search" indicated that the failure to object or move to suppress was a waiver and held that *Mapp* was prospective only. *People* v. *Angelet*, 221 N.Y.S. 2d 834. On appeal to the Appellate Division, First Department the order denying coram nobis relief was affirmed without opinion. (18 A.D.

2d 649, 235 N.Y.S. 2d 828.) The brief filed by the District Attorney of New York County in opposition argued only one point: that coram nobis could not substitute for an appeal from the judgment and collateral relief was unavailable to attack a conviction based upon an alleged unconstitutional search and seizure. (District Attorney's Brief; R. 231 through R. 236.) Leave to appeal to the New York Court of Appeals was denied by Judge Fuld on February 8, 1963 and petition for writ of certiorari denied June 17, 1963 (374 U.S. 839). The petition to the District Court followed.

*The Search and Seizure*

An exhibit before the District Court was the transcript of Petitioner's trial (R. 17-R. 219). Judge Palmieri assumed *arguendo* that the search was unlawful and stated (at R. 250), "The minutes of trial, in fact, contain nothing to the contrary."

The minutes of trial indicate, by People's witnesses, that Detectives Mendel Schein and Thomas O'Brien went to defendant's third floor "walk-up" apartment at 527 West 134th Street at approximately 12:15 in the afternoon of December 21, 1950 (R. 31). As they arrived the door opened, a painter walked out and they walked in. After entering they saw Angelet seated at a table with an old woman (R. 31-32). O'Brien said to Angelet, "I hear you have a load of stuff up here and a gun." After Angelet's denial, O'Brien said:

> "If you have it you might as well give it to us because we're going to look for it, and we'll eventually find it."

Angelet was taken to the bedroom and told,

> "You sit here in the bedroom, and we're going to start right here. We'll search right from here" (R. 33).

While O'Brien was searching, Schein spoke to "different people" in the apartment—the defendant's wife and young children (R. 33). Schein also called federal narcotics agents (R. 38).

Detective O'Brien searched through the prisoner's silverware, glasses, inside a chifferobe, through "quite a number of clothes," "searched through all the shoes," through a number of baskets (R. 33) and finally, in a dresser found a quantity of money, empty cellophane envelopes, empty capsules, a stapling machine, a box of staples and a scale (R. 34-37).[1] Federal Agents Fitzgerald and Ferro arrived at about 1:15 p.m. (R. 38, 85). Fitzgerald said "Hello" to Angelet and the two Agents began to search the apartment (R. 86). Fitzgerald found four envelopes containing heroin and cocaine capsules (R. 39, 87) and a jug of milk sugar (R. 87). Detective O'Brien "took the evidence away" from Fitzgerald (R. 87). Fitzgerald testified he was an attorney (R. 96), on duty as an Agent of the Bureau of Narcotics (R. 85), that he and Agent Ferro went there in response to a telephone call from Detective Schein and that they were there to "assist in the search" (R. 91). Fitzgerald made no notes because ". . . this case was not being prosecuted in federal court" (R. 93). Fitzgerald knew that, ". . . under Federal law if you went in without a warrant, the evidence would not be admissible." Objection by the District Attorney to further questions along this line was sustained by the court (R. 101).

Angelet was a partial cripple, his left side and part of his right having been paralyzed in an automobile accident in 1949 (R. 73, 76, 162) and prior gunshot wound (R. 164). After his arrest he was treated a number of times by prison authorities for "pain" (R. 164).

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[1] O'Brien testified that these items, except the money, were narcotics sellers' paraphernalia (R. 52).

All of the items of real evidence referred to above was received in evidence. No objection was taken except with regard to the cocaine.[2]

After the narcotics were found there was a discussion about the prisoner becoming an informer. Finally O'Brien said:

> "All right George, you're under arrest. You better get dressed and put your clothes on" (R. 45).

They left the apartment at 1:30 p.m. (R. 46), one hour and fifteen minutes after O'Brien and Schein entered the premises.

## ARGUMENT

Decisional law of past generations should not bind the present, except to the extent that its wisdom and reasoning has applicability in the current scheme of things. That Blackstone, Coke and Hale held overruling decisions to apply retrospectively does not bind us to blindly follow a rule which if found to be an anachronism should be now abandoned.

On the other hand the reluctance to reach a possibly undesired result should not cause the discarding of sound principles, particularly if the principles involved are not merely substantive or procedural rules, but rather integral parts of the common law jurisprudence.

The common law rule clearly is that overruling decisions apply retrospectively. As applied to courts of the United States this precept is grounded first on the view that courts do not "make" law, but merely discover or declare what

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[2] We concede that the objection was not taken on grounds here relevant.

has always been the law. Secondly, it is based on the federal constitutional limitation which prevents the rendering of an advisory (e.g. prospective) opinion.[3] *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26. As there stated, the federal power " . . . is to correct wrong judgments, not to revise opinions." Thus this Court, beginning with Chief Justice Marshall, has uniformly held overruling decisions to apply retrospectively; that is, any case properly before the Court would be decided on the basis of the then existing or declared legal doctrines.[4]

Cases which superficially appear to depart from this principle are merely the result of the application of a paramount rule or requirement of law. The most significant of the doctrines seemingly preventing retrospective operation is *res judicata*.[5] Thus in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), this Court refused to permit a party to reopen a final judgment in a civil proceeding where subsequent to judgment the Court held unconstitutional the statute upon which the jurisdiction of the District Court was based. Speaking for a unanimous Court, Chief Justice Hughes stated:

> "Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appro-

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[3] This constitutional limitation on federal power has no application to state courts who may render advisory opinions if they so choose and who need not even follow or accept the common law as the philosophical basis of state law. *Great Northern R'way* v. *Sunburst Oil & Rfg. Co.*, 287 U.S. 358 (1932).

[4] E.g., *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801); *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (Holmes, J., dissenting); *James* v. *United States*, 366 U.S. 213, 225 (Black, J., concurring); *Eskridge* v. *Washington*, 357 U.S. 214.

[5] See, Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121 at 149 (1940).

priately confine our consideration to the question of *res judicata* as it now comes before us. (308 U.S. at 374-75)

* * *

"Their determinations of such questions, while open to direct review may not be assailed collaterally (at 376)

* * *

"The [District] Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action." (at 377)

* * *

The Court was careful to note that the prior judgment bound only the parties to the judgment by *res judicata;* clearly implying that other persons not parties to the judgment would not be so bound because *res judicata* did not apply to them.

Other overriding rules or prohibitions, such as the constitutional limitation on the power to impair the obligations of contract likewise may prevent application of the precept of retrospectivity. And in *James* v. *United States,* 366 U.S. 213 the Court held reliance on prior overruled decisions negated the criminal intent necessary for conviction of crime.

These limitations on the retrospective application of "new" law serve practical needs of major proportions, yet the limitations are within the framework of the common law heritage and reaffirm Chief Justice Marshall's statement that,

"It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns

> . . . the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States v. Schooner Peggy,* 1 Cranch 103, at 110.

The criticism is made that the rule of retrospectivity is unrealistic, based upon the fiction that judges do not make law but merely find and declare it. We are urged to abandon this because it does not square with the realities of the judicial process.[6] However damning the appellation "fiction" may be in other areas, fictions play an essential and creative role in both legal theory and the day to day operation of the judicial process.[7] How many vessels are "unseaworthy" because a bag of beans has split open? How many defendants actually "receive" service of process published in the New York Law Journal? And how many jurors will blot from their minds excluded evidence and follow implicitly a judge's charge?

The fiction that judges do not make law stems from both common law and constitutional limitations on the power of the judiciary. Where lies legislative power if the courts now declare the power to make law? No clearer recognition could be had of judicial usurpation of legislative prerogative than to now abandon the principles which have preserved the Judicial Branch from Legislative and Executive challenge. The power to make law is vested solely in the Congress but to avoid judicial impotence where change is needed, the fiction of the declaratory concept evolved.[8]

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[6] See, e.g., *Griffin* v. *Illinois,* 351 U.S. 12 (concurring opinion, Frankfurter, *J.*), Bender, *The Retroactive Effect of an Overruling Constitutional Decision; Mapp* v. *Ohio,* 110 U. Pa. L. Rev. 650 (1962).

[7] Fuller, *Legal Fictions,* 25 Ill. L. Rev. 363, 513, 865 (1930-31).

[8] Fuller, *id.,* at 542.

Before arriving at the question of whether these principles should now be abandoned—and at what cost—closer examination must be made of other existing legal principles to see if any prevent the Court from enquiring into the legality of Petitioner's conviction and present detention.

*Res Judicata*

In the typical case where error of non-constitutional dimensions has occurred in the course of a criminal trial the only remedy is by direct appeal. If no appeal is taken or after appellate remedies have been exhausted a later decision should overrule a precedent under which a prisoner was convicted, there is no remedy available by which the prisoner can reopen his case and have the issue relitigated. For if the error was of a non-constitutional variety, habeas corpus will not lie. *Sunal* v. *Large,* 332 U.S. 174 (1947); *United States* v. *Sobell,* 314 F. 2d 314 (2d Cir.), cert. den., 374 U.S. 857 (1963), *Waring* v. *Colpoys,* 122 F. 2d 642 (D.C. Cir.), cert. den., 314 U.S. 678 (1941).

In those cases the respective courts found the alleged trial errors, claimed under cases decided subsequent to the termination of proceedings, did not touch upon constitutional rights of the petitioners. Since no constitutional rights were involved the Writ was unavailable. Although Judge Vinson in *Waring* spoke in terms of *res judicata,* the use of the term was inaccurate as it does not apply to *habeas* proceedings. Therefore cases such as *Chicot County Drainage District, Waring* v. *Colpoys, Sunal* v. *Large,* and *Sobell* cannot control here.[9]

[9] Compare: *Chicot County Drainage District* v. *Baxter, supra,* with *Bowen* v. *Johnston,* 306 U.S. 19 (1939). In the latter case Chief Justice Hughes, again speaking for a unanimous Court, held habeas corpus available for the claim which could not be raised collaterally in *Chicot.*

### *Waiver*

The failure to assert the claim at trial or on appeal cannot preclude petitioner from the assertion in this forum of the denial of constitutional right.

As to the failure to assert the claim at trial, there is no waiver because even under New York law there is no forfeiture by failure to object. N.Y. Code of Criminal Procedure, §527; *People* v. *Kelly*, 12 N.Y. 2d 248 (1963); *Jongebloed* v. *Erie Railroad Co.*, 296 N.Y. 912 (1947). The necessity of an objection is a rule limiting only the peculiar, discretionary jurisdiction of the New York Court of Appeals and is not one which limits the power of the one court to which a defendant has an appeal of right. Compare: *People* v. *Piazza*, 15 A.D. 2d 503 (2d Dept., 1961) with *People* v. *Friola*, 11 N.Y. 2d 157 (1962). But see, *People* v. *West*, 12 N.Y. 2d 1090 (1963).

But regardless of New York law the question of waiver is a federal one and to be applicable must flow from a conscious abandonment of a known right. To say that Angelet—or his counsel—knew or should have known of the defendant's right to be tried free from the tainted evidence is manifestly absurd. The highest court of New York had denied the existence of the right (*People* v. *Defore*, 242 N.Y. 13) and this Court, less than two years prior to Angelet's trial, had held no federal remedy to be available to protect the federal right involved. *Wolf* v. *Colorado*, 338 U.S. 25 (1949). To require objection and appeal in the face of two controlling decisions is to place a premium on the attorney who performs frivolous acts.[10] The cross-

[10] See, Judge Learned Hand's opinion in *U.S. ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811, reversed, sub nom. *Sunal* v. *Large*, 332 U.S. 174. Judge Hand held that counsel's reliance on the uniform decisions of two circuits and the denial of certiorari in one case was reasonable and "made any appeal so obviously fruitless as to excuse taking one." In reversing, this Court specifically reaffirmed

examination of Agent Fitzgerald by Angelet's counsel shows that he recognized his client's rights had been violated but knew he had no remedy whereby it could be asserted (R. 101).[11] Rules relating to waiver must be reasonable; one which requires clairvoyance is not. The test of forfeiture to be applied is:

> "If a habeas corpus applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claim in the state courts, *whether for strategic, tactical or any other reason that can fairly be described as the deliberate bypassing of state procedures,* then it is open to the federal court to deny him all relief if the state courts refuse to entertain his federal claim on the merits.
>
> * * * * *
>
> "[The choice not to appeal] cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures." *Fay* v. *Noia,* 372 U.S. 391 at 439 (emphasis added).

Had Angelet been convicted after *Mapp,* not raised the question in the state courts, and immediately sought habeas

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that the denial of certiorari meant nothing beyond the particular case and reliance therefore was unjustified. It was also held that the legal question involved was non-constitutional and thus could not be raised collaterally. See also, *U.S. ex rel. Campbell* v. *Rundle,* 327 F. 2d 153 at 160 (3rd Cir., 1964); *U.S. ex rel. Carafas* v. *LaVallee,* 334 F. 2d. 331 (2d Cir., 1964), cert. pending, No. 442, O.T. 1964.

[11] It would appear that under New York law the interrogation of Agent Fitzgerald, which was aborted by the sustaining of the prosecutor's objection, would be sufficient as an objection. See, *People* v. *O'Neill,* 11 N.Y. 2d 148 (1962). Compare, *Jackson* v. *Denno,* 378 U.S. 368 (1964).

corpus it might fairly be suggested that he deliberately bypassed the state system in order to obtain an immediate federal adjudication of his claim. Clearly the prisoner did not deliberately withhold the federal question from the New York courts. The fourteen years he has waited in prison refute any suggestion of a calculated waiver.

*Reliance*

We anticipate that the Respondent will urge that petitioner should not here prevail because in 1950 the State of New York may have relied upon *Wolf* v. *Colorado* in prosecuting him through use of the products of the invasion of his home. Since habeas corpus is to some extent governed by equitable principles,[12] consideration should be given to any *legitimate* reliance by the State. But can the State have legitimately relied upon *Wolf*—relied to the extent that it would be inequitable to now release George Angelet from the ten to twenty years sentence he "owes" the State of New York?

When Detectives O'Brien and Schein entered George Angelet's apartment they committed a crime; when they searched his apartment they were guilty of oppression and violated 18 U.S.C. §§241-242. Under New York Law they had acted illegally; in fact they were liable for damage in a civil action. *Doane* v. *Anderson*, 60 Hun 586, 15 N.Y.S. 459; *People* v. *Defore*, 242 N.Y. 13, cert. den., 270 U.S. 657 (1926). They were guilty of violation of the federal Civil Rights Statute, 42 U.S.C. §1983. As to the federal officers, their disregard of their duty and violation of law is *a fortiori*, even though, as Agent Fitzgerald put it, "this case was not being prosecuted in federal court."

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[12] *Fay* v. *Noia*, *supra*, at 438; *U.S. ex rel. Smith* v. *Baldi*, 344 U.S. 561, 573 (dissenting opinion).

In short they knew they were acting illegally but did so because they thought they could get away with it.

This is not the kind of case referred to by Judge Cardozo in *People* v. *Defore, supra,* where "the prisoner is to go free because the constable has blundered.". There was no "blunder" here. We have conduct which evidences not a technical mistake, but rather an arrogance, defiance of law and disregard of human dignity such as should give Respondent no equitable standing in this or any Court.[13]

*The Effect of Retrospective Application*

Assuming a latitude of choice, the Court should consider the effect generally of a decision requiring retrospective application.

One factor to be considered is the number of persons affected. It has now been over three and one-half years since *Mapp* was decided, yet to our knowledge less than a dozen cases have presented records which conclusively demonstrate that evidence obtained as the result of an illegal search and seizure was used in a state court trial.[14]

In view of the notoriety attending the *Mapp* decision this dearth of petitions—*pro se* or otherwise—forecasts that retrospective application threatens no "general goal delivery."

In his monograph, "A Comment on The Law of Search and Seizure," Judge Nathan R. Sobel of the New York Supreme Court noted:

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[13] Compare: *Rochin* v. *California*, 342 U.S. 165 (1952).

[14] *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir.), *cert. den., sub nom. Peppersack* v. *Hall*, 374 U.S. 809 (1963); *Walker* v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963); *Linkletter* v. *Walker*, No. 95, O.T. 1964 (323 F. 2d 11); *California* v. *Hurst*, No. 45, O.T. 1964 (325 F. 2d 891); *Eastman* v. *Fay*, No. 415 Misc., O.T. 1964 (225 F. Supp. 677, reversed 333 F. 2d 28); *Sisk* v. *Lane*, 331 F. 2d 235 (7th Cir., 1964).

"Since concern, if not consternation, followed the *Mapp* ruling, I have re-examined the trial record of 150 trial verdicts in my part since January, 1960. That investigation discloses that an issue of unlawful or unreasonable search might have been raised in 14 such cases. Twelve were 'contraband' cases; one was a receiving charge, another was a burglary charge. A re-examination of 850 pleas of guilty during that same period from 'Description of Crime' in the probation reports, discloses that the same percentage holds true both as to number of issues and categories of crime. And, to be noted, is that exclusion of the evidence would not have been determinative of the issue of guilt or innocence in *all* cases. Other evidence existed in some."

Thus in a thousand cases we have indication that in fourteen the issue of unreasonable search and seizure *might* have been raised.[15] Presumably untainted convictions could be obtained in some of these cases if a new trial were ordered. Also, presumably, some of these defendants have already completed service of their sentences.

Of course the major consideration must be that George Angelet is now in prison solely because of the violation in 1950 and at present of his rights under the Federal Constitution.

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[15] The claim cannot be raised in the guilty plea cases. *Alexander* v. *United States*, 290 F. 2d 252 (5th Cir., 1961); *Broadus* v. *Lowry*, 245 F. 2d 304 (6th Cir., 1957); *Winston* v. *United States*, 224 F. 2d 337 (2d Cir., 1955). See, *United States* v. *Miller*, 293 F. 2d 697 (2d Cir., 1961) involving a Mallory claim raised under Section 2255 after a plea of guilty. Chief Judge Lumbard wrote, "The sentence was based on the plea and not on the evidence."

## POINT I

**Petitioner's Custody Under a Judgment Secured Solely Through Evidence Which Was the Product of an Illegal Search and Seizure Is in Violation of the Constitution Regardless of the State Evidentiary Rule Prevailing at Time of Judgment or the Former Absence of an Effective Federal Remedy.**

The Constitution has always provided that an unreasonable search and seizure by state or Federal officers was a violation of the rights of the person aggrieved. *Wolf* v. *Colorado* did not make lawful "state" searches without warrant or probable cause nor did *Mapp* make them illegal.[16] All *Wolf* held was that no federal remedy existed in the criminal proceedings in which the fruits of the unlawful conduct were offered. Thus the *Wolf* Court, by permitting suit to be brought under the Civil Rights Act, recognized that a right had been then violated. *Wolf* v. *Colorado*, 338 U.S. at p. 30, n. 1.

In *Mapp* the Court declared that this civil remedy was ineffective to protect the right and expanded Federal remedies to directly affect the state proceeding in which the violation of right was perpetuated.

Arguments advanced against the retrospective application of *Mapp* fail to recognize that the Court has not created a new right but merely removed a procedural bar to the assertion of an existing one. See, *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401 (1904). The search and seizure here was just as unlawful in 1950 as it would be today.

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[16] In *Elkins* v. *United States*, 364 U.S. 206, at 213 the Court said:

> "[In *Wolf*] it was unequivocally determined by a unanimous Court that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."

It has been suggested that the right vindicated by *Mapp* falls into some lesser category of protection than other rights secured by the Constitution. Therefore the retrospective application given to cases dealing with the right to counsel, the right to a free appellate transcript, and the right to be tried free from involuntary confessions are said not to control here because only the "obviously guilty" are convicted under illegally seized evidence. We believe that this argument is in reality an argument against *Mapp* v. *Ohio* itself, and lies as the cornerstone of those decisions refusing to give full scope to the Fourth Amendment rights of convicted persons.

Argument has also been made that the purpose of *Mapp*, claimed to be deterrence of official oppression, can be served by limited retrospectivity (i.e., application to future conduct and cases pending and within the judicial process on the date of *Mapp* decisions).[17] Aside from the fact that this limited retrospectivity is equally inconsistent with the assumed "deterrence" purpose of *Mapp* as would be complete retrospectivity, the premise cannot stand close inspection.

The right of privacy secured against state action is "a right basic to a free society" (*Mapp*, at 656), and is equated by the Court with the right to be tried free from an involuntary confession (*Mapp*, at 656-657). The right is one which accrues to the person aggrieved and, although repeated and wilful violation of the right by others has provided incentive for fashioning particular remedies, it remains the right of the injured which is secured and not the disability of the violator which is condemned.

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[17] Bender, *op. cit.*; *supra*, note 6; *Linkletter* v. *Walker*, *supra*, note 14; Compare: *People* v. *Loria*, 10 N.Y. 2d 368 (1961), with *People* v. *Muller*, 11 N.Y. 2d 154, *cert. den.*, 371 U.S. 850 (1962); *United States ex rel. Carafas* v. *LaVallee*, *supra*, note 10.

While we of course recognize that deterrence of official misconduct to a greater or lesser extent provided the impetus for the overruling of *Wolf*, we suggest that the courts in *Linkletter* and *Angelet* have overlooked the fact that the rule of exclusion is the law, not that the purpose of the rule is the law.

By focusing upon the deterrence aspect of the Fourth Amendment in its opinion in *Mapp* we do not believe the Court meant to suggest that this was the basis for the overruling of *Wolf*. To interpret *Mapp* as elevating to legal significance the "deterrence aspect" is to completely reject the line of cases holding that the good faith of the searching officers is not enough to support an unreasonable search, *Director General of Railroads* v. *Kastenbaum*, 263 U.S. 25, 28 (1923); *Henry* v. *United States*, 361 U.S. 98, 103 (1959), and the cases holding that regardless of the extent of official misconduct, a defendant has no standing to demand suppression unless his personal rights were violated and he "belongs to the class for whose sake the constitutional protection is given." *Jones* v. *United States*, 362 U.S. 257, 261 (1960). Such rulings are meaningless if it is deterrence which is commanded and not the right which is protected by the Constitution.

## POINT II

### All Decisions of the Supreme Court Interpreting the Constitution Are Retrospective in Scope.

The general rule has always been that overruling decisions apply retroactively. It rests upon the view, authoritatively set forth by Blackstone that the power of common law judges is to determine what the pre-existing law is and then declare it.[18] Blackstone knew that judges changed their rulings on points of law but this did not, to him, indicate any lawmaking function on their part:

> ". . . but even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law but that it was not law . . ." 1 Blackstone, *Commentaries*, *70.

Thus the overruling decision impeaches the validity of the prior decision as evidence of what the law was. Except in the cases where other supervening principles prevent its application,[19] the courts of the United States have heretofore held overruling decisions to apply retrospectively. See, e.g., *Sunray Oil Co.* v. *C.I.R.*, 147 F. 2d 962 (10th Cir.), *cert. den.*, 325 U.S. 861 (1945); *Massaglia* v. *C.I.R.*, 286 F. 2d 258 (10th Cir., 1961); *County of Los Angeles* v. *Faus*,

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[18] The rule requiring retrospectivity is not necessarily dependent upon the Blackstonian theory. It can be justified as in accord with the concept that the function of a common law court is to render a legal decision as to the consequences of facts which have already occurred while the function of the legislature is to make rules that apply only prospectively.

[19] *Supra*, pp. 10-15.

48 Cal. 2d 672, 312 P. 2d 680, 685-686 (1957); *Peerless Electric Co.* v. *Bowers*, 164 Ohio St. 209, 129 N.E. 2d 467 (1955); *Texas Co.* v. *Oklahoma Tax Comm.*, 249 P. 2d 985 (Okla. 1952); *Mickel* v. *New England Coal & Coke Co.*, 132 Conn. 671, 47 A. 2d 187 (1946); *Laabs* v. *Wisconsin Tax Comm.*, 218 Wis. 414, 261 N.W. 404 (1935); 14 Am. Jur., *Courts*, §130; 21 C.J.S., *Courts*, §194.

The first substantial attack on the principle of retrospective overruling came in 1932 from (then) Chief Judge Cardozo of the New York Court of Appeals. He advocated that a court faced with an antequated and unjust rule upon which a party had justifiedly relied, should not overrule a precedent in a manner which would cause real injustice to that party.[20]

Although this proposal has been rejected by New York,[21] it has been accepted elsewhere and we will not attempt to refute its general soundness.[22]

However, the emphasis of the proposal and its proponents has been upon legitimate or justified reliance and

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[20] Address by Chief Judge Cardozo to the New York State Bar Association, January 22, 1932, 55 Report of N.Y.S.B.A. 263, 294-296 (1932). In *Great Northern Ry.* v. *Sunburst Oil & Rfg. Co.*, 287 U.S. 358 (1932) he further limited his proposal to non-constitutional cases.

[21] *Cammack* v. *Slattery & Bro.*, 241 N.Y. 39, 46 (1925); *People ex rel. Rice* v. *Graves*, 242 App. Div. 128 (3rd Dept., 1934), *aff'd* 270 N.Y. 498, *cert. den.*, 298 U.S. 683 (1936). Judge Van Voorhis has called it, "an interesting suggestion which has not been adopted, though it has often been discussed." Van Voorhis, *Cardozo and the Judicial Process Today*, 71 Yale L.J. 202, 205 (1960); see also, Fuld, *The Commission and the Courts*, 40 Cornell L.Q. 646-647 (1955) where, in discussing the preferability of change by legislation rather than judicial decision, Judge Fuld states, ". . . any change made by the courts would necessarily be retroactive in its operation."

[22] 21 C.J.S., *Courts*, §194(b).

unwillingness to cause substantial injury to a party who has merely done what the courts previously said was permissible.[23] New York lacks equitable standing to claim reliance on the overruled decision and certainly cannot claim injury.

Another, and more basic, limitation on the application of the prospectivity proposal, equally applicable to limited retrospectivity or "selective prospectivity" is that we are not here dealing with the overruling of an interpretation or declaration of the unwritten common law. Our case rests not on Blackstone or the common law, but on the Constitution, and,

> "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decison of the Court."[24]

Thus Cardozo, the leading proponent of non-retrospective overruling and the rejection of the Blackstonian view, while an Associate Justice of this Court limited his proposals to non-constitutional claims or causes.[25]

Close analysis of this Court's opinion in *Great Northern* v. *Sunburst, supra,* demonstrates that it provides no comfort to the Respondent. In that case a shipper had brought suit against a carrier to recover allegedly excessive rate

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[23] Cardozo, *The Nature of the Judicial Process* (Yale Press, reprint, pp. 146-149).

[24] Warren, *The Supreme Court in United States History,* vol. II, pp. 748-49 (Rev'd Ed. 1926) in which he quotes from *The Works of George Bancroft* (1852), IV, 549, "To the decision of an underlying question of constitutional law no . . . finality attaches. To endure, it must be right."

[25] *Great Northern* v. *Sunburst,* 287 U.S. 358 (1932). Actually the case does not even stand for the proposition that a *federal* court has the power to overrule prospectively in a non-constitutional case. See, note 3, *supra.*

charges made in conformity with a tariff schedule approved by the State Board of Railroad Commissioners. The suit was brought under a 1921 Montana Supreme Court decision which held that a shipper might sue the carrier because of excessive rates notwithstanding the fact that the rate had been approved by the Commission. At the time of the disputed transaction between the parties, the 1921 case was "the law" and there was, " . . . notice to all concerned that payments exacted by a carrier . . . were subject to be refunded if found thereafter . . . to be excessive." *Great Northern, supra,* at 362. Sunburst then brought suit and recovered on the basis of the 1921 decision. Upon appeal, the Montana Supreme Court affirmed the recovery but announced that for future transactions the rates established by the Commission would be incontestable.

Justice Cardozo's opinion merely states that there was no federal inhibition upon the state court's choice to overrule its 1921 decision prospectively and yet apply the earlier decision to those who "had acted on the faith of it." He further qualified this by an enquiry into whether the carrier's constitutional rights had been violated by either the trial court's reliance upon the earlier case or the Supreme Court's adherence to the old rule on the case before it at a time when it announced that it would not follow it for future transactions. Cardozo held that neither of the inconsistent rulings on tariff contestability affected any constitutional right of the carrier. Actually had the Montana court applied the new law retrospectively the shipper would have been in a position to complain that retrospective operation ran afoul of the constitutional limitation upon the impairment of contractual obligations.

Analysis of both the writings and opinions of Justice Cardozo indicates no more than his belief that state courts may, if they so choose, overrule prospectively in cases

where neither the "old" nor "new" law affected constitutional rights and where prospective application would be the only way of preventing injustice to the party who had legitimately relied upon the prior law. Not one of the considerations which motivated Cardozo to reject Holmes' "thousand years [of retrospective operation]" is present in this case.[26]

## POINT III

**Regardless of the Applicability of Mapp v. Ohio to the Conduct of the State Officers, the Participation by Federal Officers Entitles Petitioner to Federal Relief.**

The conduct of the federal agents in the search of Angelet's home was a clear and wilful violation of then existing federal law. Even under *Wolf*, Fitzgerald's testimony was proscribed. *Rea* v. *United States*, 350 U.S. 214 (1956).[27] The policy considerations which dictated the injunctive relief in *Rea* are equally applicable to federal habeas corpus relief after the tainted testimony and evidence have been adduced at trial.

## Conclusion

This case presents no question of judging past actions by present standards of conduct; rather we are dealing with the question of whether a present remedy may be invoked to cure a constitutionally intolerable evil; inexcusably wrong when perpetrated and perpetuated by each day of future imprisonment.

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[26] *Kuhn* v. *Fairmont Coal Co.*, *supra*; note 4.

[27] Although *Rea* is also a "subsequent" decision, it is not an overruling one. The Court's opinion treat the disposition as completely consistent with *Wolf*.

For the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be reversed and the case remanded to the district court with directions to sustain the writ of habeas corpus.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1964

No. 578

GEORGE ANGELET,

Petitioner,

*against*

HON. EDWARD M. FAY, as Warden of Green Haven State Prison, Stormville, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT

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# Supreme Court of the United States

OCTOBER TERM, 1964

No. 578

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Petitioner,

*against*

HON. EDWARD M. FAY, as Warden of Green Haven State Prison, Stormville, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT

### Preliminary Statement

Petitioner George Angelet was convicted after a New York State court trial in 1951 of the crime of possession of narcotics with intent to sell. He is presently held in custody by the respondent Warden pursuant to that judgment of conviction. Relying on the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), petitioner now seeks relief from his imprisonment by way of federal habeas corpus. He claims that his 1951 conviction was obtained by the use of evidence seized in violation of the Fourth and Fourteenth Amendments and argues that the *Mapp*

decision must be applied retroactively in a habeas corpus proceeding. The United States District Court for the Southern District of New York (PALMIERI, J.) denied the petitioner's application for a writ of habeas corpus on September 20, 1961 (R. 249); the United States Court of Appeals for the Second Circuit, sitting en banc, affirmed that denial by a vote of 7-2 on June 11, 1964 (R. 257). A writ of certiorari to the Court of Appeals for the Second Circuit was granted by this Court on October 12, 1964 (R. 283).

## Opinions Below

The opinion of the District Court (R. 249-50) is unreported. The majority opinion of the Circuit Court, per MEDINA, J. (R. 257-71), is reported at 333 F. 2d 12; the dissent, per MARSHALL, J. (R. 271-81), is at 333 F. 2d 12, 21.

## Jurisdiction

Petitioner has invoked the jurisdiction of the Court under 28 U.S.C. § 1254(1).

## Question Presented

Would the interests of justice be served by a retroactive application of the exclusionary rule established by the decision in *Mapp* v. *Ohio* in view of (1) the strong reliance of the state courts and prosecutors upon the common law rule of admissibility and upon this Court's decision in *Wolf* v. *Colorado* expressly permitting the use of such evidence; (2) the adverse effects a retroactive holding would have upon the orderly administration of criminal justice; and (3) the fact that no purpose of the exclusionary rule would be furthered by its application to past convictions?

## Constitutional and Statutory Provisions Involved

**Constitution of the United States:**

Amendment IV—The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1— . . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Title 28, United States Code:**

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless . . . .

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent

to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

• • •

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

## Statement of the Case

### The State Trial and Conviction

Petitioner George Angelet was tried before Judge Jonah GOLDSTEIN and a jury in the former Court of General Sessions, New York County,[1] on a two count indictment charging possession of narcotics with intent to sell (N. Y. Penal Law, § 1751 subd. 2), and unlawful possession of narcotics (N. Y. Penal Law, § 1751 subd. 3). The trial lasted from January 30, 1951 to February 2, 1951.

It was admitted from the outset of the trial that Angelet was guilty of the possession charge (opening statement of counsel, R. 26). His defense to the charge of possession with intent to sell was that he was a user, rather than a seller of narcotics (statement of counsel, R. 26-29, 83; testimony of Angelet, R. 111, 116). The People's presentation of evidence was directed toward showing that when Angelet was arrested on December 21, 1950, he had in his possession over two ounces of heroin, as well as milk sugar, empty capsules, and other paraphernalia commonly used by sellers of narcotics.

Detective Thomas W. O'Brien, who for four years had been attached to the Narcotics Squad of the New York

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[1] Now incorporated into the Supreme Court, New York County (N. Y. Laws of 1962, Ch. 692).

City Police Department, testified that he went to Angelet's apartment with Detective Mandel Schein at about 12:15 p.m. on December 21, 1950 (R. 30, 31). According to Detective O'Brien, he and Detective Schein entered the apartment through the open front door, walked a few steps into the apartment, and observed Angelet seated at a kitchen table (R. 31-32). They immediately told him that they had information that he had narcotics and a gun in the apartment (R. 32). Angelet denied this (R. 32-33), but agreed to accompany the detectives to the bedroom (R. 33).

When the detectives said they intended to search the bedroom, Angelet replied that they were wasting their time (R. 33), but when Detective O'Brien found a quantity of loose money in the top dresser drawer, he suggested that the detective might "take some and get out of here, and save me some trouble" (R. 33-34). Detective O'Brien continued to search through the dresser, however, and found a number of cellophane envelopes (R. 34), a quantity of empty capsules (R. 35), a stapling machine (R. 36), a box of staples (R. 36), and a scale (R. 36). A Federal Narcotics Agent, Benjamin Fitzgerald, who had been called by Detective Schein (R. 38), found four packages containing a white powder (R. 39-40).

The cellophone envelopes, the empty capsules, the stapling machine, the staples and the scale were all introduced at the trial after Angelet's counsel had specifically stated "no objection" when they were offered in evidence by the People (R. 34, 36, 37, 38). Detective O'Brien testified that, in his experience, these items were commonly used by sellers of narcotics in the course of their business (R. 52). The white powder contained in three of the envelopes found by Agent Fitzgerald was subsequently identified by a chemist as being a thirty per cent heroin alkaloid having a total avoirdupois weight of two and seven-thirty-

seconds of an ounce (R. 78-80)[2]. The chemist, Samuel Tabor, also testified that the fourth package contained 18 capsules and was a mixture of powder and cocaine in undetermined amounts (R. 80-83). Angelet's counsel stated expressly that he had "no objection" to the admission into evidence of the three packages containing the heroin (R. 84); he objected to the admission of the fourth package on the ground that the percentage of its cocaine content had not been definitely established (R. 81-84).

Angelet testified in his defense that he had never sold narcotics (R. 111, 115), but had the narcotics in his possession for his own use (R. 111, 117, 146).

To rebut Angelet's testimony that he was a narcotics user and had suffered from a bleeding nose, nausea, dizzy spells and an inability to sleep or eat when jailed without drugs after his arrest (R. 149), the People introduced the testimony of Detective O'Brien that Angelet had stated, at the time he was booked, that he was not a user (R. 156). This statement was recorded in the precinct arrest book (R. 160-61). The People also introduced the testimony of the physician who examined Angelet on the day after his arrest, as well as on three subsequent occasions (R. 162, 163). This physician, Dr. Francis Sisca, testified that Angelet denied the use of drugs (R. 162), that Angelet had no marks indicating use of drugs (R. 162), and that Angelet never complained to him of anything that appeared to be a symptom of drug addiction (R. 163).

On February 2, 1951, the jury returned a verdict of guilty of the crime of unlawfully possessing a narcotic drug with intent to sell (R. 218). Thereafter, on February

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[2] N. Y. Penal Law § 1751 subd. 2 at that time provided, *inter alia*, that possession of two or more ounces of certain preparations, compounds or mixtures containing three per cent or more of the alkaloids of heroin or cocaine, established a presumption of intent to sell the narcotics (charge to jury, R. 215).

27, 1951, Angelet was sentenced to imprisonment as a second felony offender (N. Y. Penal Law § 1941) for a term of not less than ten nor more than twenty years. An appeal from the conviction was dismissed by the Appellate Division, First Judicial Department, on March 4, 1952 (N.Y.L. Jour., Mar. 5, 1952, p. 892, col. 1).

**The Coram Nobis Application**

In August, 1961, following this Court's decision in the *Mapp* case, petitioner filed a motion in the trial court for a writ of error coram nobis, alleging that his conviction was based upon evidence introduced in violation of the Fourth Amendment to the United States Constitution and that coram nobis was a proper remedy to invalidate that conviction (R. 229, 237). The Court (DAVIDSON, J.) denied the motion without a hearing. Judge DAVIDSON's memorandum opinion noted that petitioner had made no attempt to suppress the evidence or to prevent it from being introduced against him at trial, and held that the *Mapp* rule should not be applied retroactively to upset the conviction (R. 229-31; *People* v. *Angelet*, 221 N.Y.S. 2d 834 [Ct. of General Sessions, N. Y. Co., Nov. 16, 1961]). The Appellate Division affirmed without opinion (19 App. Div. 2d 649, 235 N.Y.S. 2d 828 [1st Dept. 1962]), and leave to appeal to the New York Court of Appeals was denied by Judge FULD of that Court on February 8, 1963 (R. 16). This Court denied a petition for a writ of certiorari on June 17, 1963 (R. 226; *Angelet* v. *New York*, 374 U. S. 839).

**The Federal Habeas Corpus Proceedings**

In May, 1963, Angelet applied to the United States District Court for the Southern District of New York for a writ of habeas corpus, claiming that he was entitled to the benefit of the *Mapp* rule and requesting a hearing on his claim that his conviction was based upon illegally seized

evidence (R. 1-4)[3]. After first reserving decision to await disposition of the then-pending certiorari petition (R. 223), the District Court (PALMIERI, J.), on September 20, 1963, denied the application for the writ (R. 249-50). District Judge PALMIERI assumed *arguendo* that the search of Angelet's apartment was conducted illegally (R. 249-50); he held, however, that even if this were so, it would not require the release of a prisoner who had been convicted under the law in force at the time of the trial and for a decade thereafter at a trial which accorded him full due process of law (R. 250).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the denial of the habeas corpus application in a 7-2 decision rendered on June 11, 1964 (R. 257-81).

The majority opinion of Judge MEDINA, after first noting that the opinions in the *Mapp* case gave no sure indication of the Justices' views on the retroactivity question (R. 259-61), proceeded to a discussion of two of the principal arguments advanced in support of retroactive application of the exclusionary rule. The argument that petitioner was entitled to the writ on the ground that, at the time of his trial, the admission of illegally seized evidence violated the Constitution was rejected as simply unrealistic. The Court found no merit at all to the Blackstonian theory that an overruled decision (in this instance *Wolf* v. *Colorado*, 338 U. S. 25 [1949]) never was the law (R. 261-62). The argument that retroactivity was required because a constitutional question was involved was similarly rejected—the Court took the view that the development of constitutional law calls into play the same operations of the judicial process as does the development of a body of law in any other field (R. 262).

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[3] Angelet's Appellate Division brief (R. 236-248) and his petition for certiorari (R. 5-16) were annexed to the habeas corpus petition. The minutes of the 1951 trial (R. 17-219) were before the District Court as an Exhibit.

Turning next to a discussion of the reasons for and against a decision that the doctrine of *Mapp* v. *Ohio* was to be given retroactive effect, the Circuit Court found the considerations in favor of limiting its retroactive effect to be by far the more persuasive. The majority noted particularly that the essentially deterrent purpose of the exclusionary rule would not be served by a general retroactive application of the *Mapp* decision (R. 263-67); that the People of the State of New York had a legitimate interest in seeing that a sentence imposed upon a criminal defendant was fully executed where there was no question of the reliability of the evidence or of the fundamental fairness of the trial proceeding (R. 267-68); and that the effect of a retroactive application of the *Mapp* decision would be to open all past convictions involving searches and seizures to collateral attack with every new interpretation of the Fourth and Fourteenth Amendments, thus putting an overwhelming burden on judicial administration and seriously impairing the further development of constitutional law in this area (R. 269-70).

Circuit Judge MARSHALL, in his dissenting opinion, found an intent to apply the exclusionary rule retroactively in the text of the *Mapp* opinion (R. 272-75). He also noted that retroactive application had been given to this Court's decisions establishing the right of an indigent defendant to counsel, to a transcript for the purpose of taking an appeal without fees, and to the Court's increasingly stringent tests for determining the voluntariness of confessions (R. 275-76). As for the fact that *Mapp* was an overruling decision, Judge MARSHALL argued that the state could not claim any good faith reliance on *Wolf* v. *Colorado;* it was "on notice", he said, at the time of Angelet's trial, that the Supreme Court did not condone unlawful searches and seizures and looked to the states to provide corrective process (R. 276-77).

The dissent also took the position, relying on *Fay* v. *Noia,* 372 U. S. 391 (1963), that a federal judge acting on

a petition for habeas corpus must determine the constitutional validity of a state prisoner's confinement by assuming that his trial was held on the very day that his petition is being considered (R. 277-78). Applying this test, Judge MARSHALL found that "fundamental error" was committed at Angelet's trial (R. 297). In closing, the dissent argued that a practical difficulty with the majority approach was that it presented courts with the necessity of fixing an arbirary date for the *Mapp* rule to begin to take effect (R. 279).

## Summary of Argument

The common law rule with respect to the use at trial of unlawfully obtained evidence was clear—illegality of the means by which evidence was procured was not a ground for its exclusion at trial, except where the evidence was an involuntary confession or was secured in violation of the self-incrimination privilege. This was the law in New York at the time of petitioner's trial and this rule of evidence had been given explicit constitutional sanction by this Court in *Wolf* v. *Colorado*, 338 U. S. 25 (1949). Not until *Mapp* v. *Ohio*, 367 U. S. 643 (1961) was decided, did any criminal defendant have a right to have evidence obtained by an illegal search excluded at his trial. Under the existing state of the law in 1951, there is no constitutional basis for concluding that petitioner had any "right" at trial to exclusion of the evidence to which he now objects. Thus, it is clear that the judgment of conviction pronounced upon him was valid when it was rendered and became final.

A. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), this Court rejected the notion that a constitutional decision must always be retrospectively applied. Rather, it emphasized that the question of retroactivity will depend upon the considerations in each type of case. It therefore employed a process of balancing the considerations in favor of retroactivity against those in favor of non-retroactivity and reached the conclu-

sion that society's interest in the finality of a judicial decision was the paramount consideration. This kind of balancing process is even more appropriate in a habeas corpus proceeding in view of the equitable nature of such a proceeding. And, since the instant case involves a judgment which was clearly valid when it became final, the policies underlying the doctrine of res judicata are highly significant in determining whether the new rule of law declared by this Court in *Mapp* should be retrospectively applied. Thus, the instant judgment of conviction carries a strong presumption of continuing validity which cannot be overcome unless there are, on balance, overriding societal purposes which can be achieved only by nullifying the judgment. This was the view taken by then Judge VINSON in *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir.), *cert. denied* 314 U. S. 678 (1941), and by Judge FRIENDLY in *United States* v. *Sobell*, 314 F. 2d 314 (2d Cir.), *cert. denied* 374 U. S. 857 (1963), as well as by the Court below in the instant case.

B. On balance, it is clear that retroactive application of *Mapp* would be improper. Not only is the *Mapp* rule unrelated to a fair determination of guilt or innocence, but there are three factors which strongly militate against a retrospective application—legitimate and justifiable reliance upon the established law; the disruptive and chaotic effect upon the administration of criminal justice which would follow from such an application; and the total irrelevance of such an application to the purposes of the exclusionary rule.

The reliance by the state judicial system upon *Wolf* v. *Colorado* and its approval of the common law rule was unquestionably justified. If this Court were now to apply *Mapp* retrospectively, it would be telling the state courts that they should have done something which this Court had specifically told them they were not required to do. Moreover, the prosecutor, relying upon *Wolf*, undoubtedly pre-

pared his case on the basis of what this Court had held was the law. Thus he knew that he could use the evidence now objected to by petitioner as an integral part of his case, without regard to the means by which it had been obtained. He could, therefore, prove his case without introducing other evidence which might, in his judgment, have been merely cumulative and which the passage of time would, in all probability, make inaccessible if a retrial were ordered. Retrospective application of *Mapp* would require this Court to ignore such reliance, resulting in injury to the People of the State of New York because of the inability to impose criminal responsibility upon a violator of their laws.

The effect of a retrospective application of *Mapp* upon the orderly administration of the criminal law would be little short of catastrophic. Not only would a large number of initially valid pre-*Mapp* convictions be immediately affected, but, presumably, any new decision in the extremely fluid field of constitutional due process would also be retrospectively applied. Retrospective application would, of course, penalize society by giving significant advantages to a convicted prisoner both on collateral attack and, if successful, upon retrial of his case, as the inevitable result of delayed litigation. Finally, and perhaps most importantly, retroactive application of *Mapp* would be tantamount to telling state courts not only that they must decide every relevant federal question correctly at the time of trial, but also that they must anticipate any federal claim that might be raised in the future and decide that correctly as well, irrespective of whether the claim had ever been raised by the parties. The result would be decidedly detrimental to the responsibility of state court judges, who are charged with primary responsibility for the administration of criminal justice.

The primary purpose of the new exclusionary rule declared in *Mapp* is to deter unlawful police conduct. It is

clear that retroactive application would not in any way fulfill this purpose. To the extent that the exclusionary rule serves as an effective deterrent to unlawful police conduct, it is because the police, after *Mapp*, act with the knowledge that the fruits of illegal searches will not be admissible in criminal trials. Another purpose of the *Mapp* rule, the maintenance of judicial integrity (367 U. S. at 659-660), also could not be furthered by retroactive application. If anything, judicial integrity would be diminished by such an application since the precedental value of any decision would thereby be questioned and public confidence in the stability of judicial decisions would be seriously undermined. Moreover, to the extent that a healthy federalism is also a purpose of the *Mapp* decision, this would be subverted by a holding that any declaration of new law by this Court would automatically subject a valid state criminal conviction to the possibility of nullification by a federal habeas corpus court.

Against these many and weighty considerations militating against retroactive application of *Mapp* must be balanced the single fact that petitioner is presently deprived of his liberty. However, the circumstance that evidence which was properly admitted at petitioner's 1951 trial might not be admissible if he were retried today is not sufficient reason for sustaining the writ in the face of the compelling social interests which favor an essentially prospective application of the new rule declared in *Mapp*.

C. It is noteworthy that, in all of the cases in which this Court has retrospectively applied a new rule of law, the considerations militating against such an application were minimal. Thus, in cases such as *Eskridge* v. *Washington*, 357 U. S. 214 (1958); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); and *Jackson* v. *Denno*, 378 U. S. 368 (1964), there was some combination of weaker reliance, a less shocking effect on the orderly administration of criminal justice, and a singular ability of retrospective application to further

the purposes of the new rule. Moreover, in all these cases fundamental rights were violated, making the proceedings essentially lawless—the defendant had been deprived of a fair opportunity to litigate the question of his guilt or innocence. There is no such question of unfairness in the instant case and each element favoring a prospective application is substantially stronger than it was in any of those cases. The balancing process, therefore, properly demands a prospective application here just as it indicated a retrospective application in those cases.

Similarly, considerations of reliance and of the disruptive effect upon the administration of criminal justice are substantially different in the coerced confession cases decided by this Court on habeas corpus from what they are in the instant case. Whereas the use at trial of illegally seized evidence did not, prior to *Mapp*, violate any recognized right of a defendant, the use of a coerced confession has historically made a trial a fundamentally defective proceeding and rendered the resulting judgment void *ab initio*. In the coerced confession cases, habeas corpus relief was appropriate, since the trial court had applied the wrong standard in examining an issue which it knew it had to test. By contrast, a holding of retroactivity in the instant case would be a holding that the trial court should have initially examined an issue which this Court had specifically said it was not constitutionally required to examine and which the parties to the litigation had not even asked the Court to examine.

The approach which we suggest is not undercut by any of the arguments advanced by petitioner. His invocation of the Blackstonian theory of discovered law to rationalize a requirement of retroactivity in all cases patently ignores the fact that courts do make law. It has been rejected by modern scholars and should be discarded as an unsound fiction, especially inappropriate in the habeas corpus field. Petitioner's allusion to the case or controversy clause of

the Constitution is plainly inapplicable. That requirement is obviously satisfied in the instant case since this Court must decide the retroactivity issue to dispose of the proceedings at bar.

Application of a balancing process is in no way affected by the line of cases including *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch) 102 (1801) and *United States* v. *Chambers,* 291 U. S. 217 (1934). These cases establish no general rule of retroactivity. They are, rather, simply cases in which this Court has followed the common law principle of abatement, applying the law as it existed at the time a case was reviewed in the direct appellate process and before the judgment in question ever reached finality. Indeed the implication of these cases is that, if the judgment has reached finality and cannot be said to be void *ab initio,* it should not be upset.

Moreover, application of the abatement principle indicates that the problem of "drawing lines", suggested by the dissent below (R. 271, 279-281), is not at all a difficult one. It is logical, in view of the proper emphasis upon finality of judgments found throughout our history, to hold simply that a state conviction which had reached finality prior to the *Mapp* decision should not be open to collateral attack by way of habeas corpus. This approach would be in accord with this Court's treatment of the cases of *Stoner* v. *California,* 376 U. S. 483 (1964); *Fahy* v. *Connecticut,* 375 U. S. 85 (1963); and *Ker* v. *California,* 374 U. S. 23 (1963).

## ARGUMENT

**Balancing the considerations relevant to the problem of retroactivity leads inescapably to the conclusion that *Mapp* v. *Ohio* should not be applied on habeas corpus to nullify a valid final judgment of conviction.**

The common law rule with respect to the use at trial of illegally obtained evidence was clear—the illegality of the means by which evidence was procured was not a ground for its exclusion at trial, except where the evidence was an involuntary confession or was secured in violation of the self-incrimination privilege. McCormick, Evidence § 137 (1954); 8 Wigmore Evidence, §§ 2183-2184b, 2264 (McNaughton rev. 1961); Note, 150 A.L.R. 560 (1943). The early federal rule was identical (*cf. Adams* v. *New York*, 192 U. S. 585 [1904]; *United States* v. *Wilson*, 163 Fed. 338 [S.D.N.Y. 1908]; *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 [E. D. Pa. 1912]), as was the rule in virtually all the states prior to the decision of this Court in *Weeks* v. *United States*, 232 U. S. 383 (1914), and in most states even after *Weeks*.[4]

The New York courts, at the time of petitioner's trial, adhered to the rule of admissibility established in *People* v. *Adams*, 176 N. Y. 351 (1903), *aff'd sub nom Adams* v. *New York*, 192 U. S. 585 (1904), and *People* v. *Defore*, 242 N. Y. 13 (1926), relying upon the availability of other remedies to protect the individual's right to privacy. *People* v. *Defore*, *supra* at 19, 23-24. In 1949, less than two years before petitioner's trial, this Court itself had held specifically that the Fourteenth Amendment to the Constitution did not prohibit the admission of evidence obtained by an unreasonable search and seizure. *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

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[4] See appendices in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39 (1949) and *Elkins* v. *United States*, 364 U. S. 206, 224-34 (1960).

In view of this state of the law it can hardly be said that petitioner had any "right" at the time of his 1951 conviction to have illegally seized evidence excluded at his trial. Not until *Mapp* v. *Ohio*, 367 U. S. 643 (1961) was decided, did a defendant have any such right". The judgment of conviction in the instant case was thus clearly valid at the time it became final in 1952, upon the dismissal of petitioner's appeal. Only if some compelling societal objectives would be achieved by its present nullification should that judgment now be vitiated by a retroactive application of the *Mapp* rule.

**A.**

**The question of retroactivity can properly be decided only by a process of balancing all relevant factors.**

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), this Court emphasized the importance of the existence of a valid final judgment as it laid to rest the idea that a constitutional decision must always be retrospectively applied. The question there was whether effect should be given to a 1936 decree of a federal district court providing for a plan of readjustment of the Drainage District's indebtedness. The lower federal courts had refused to accept a plea of res judicata based upon the 1936 decree because the statute under which the decree was issued had subsequently been declared unconstitutional by this Court in *Ashton* v. *Cameron County District*, 298 U. S. 513 (1938).

In reversing, Mr. Chief Justice HUGHES spoke for a unanimous Court:

> "The actual existence of a statute, prior to such determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent

> ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attentions of courts, state and federal, and it is manifest that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage District* v. *Baxter State Bank, supra* at 374.

This language and the approach it dictates are highly pertinent to the case at bar. Although the instant case involves the nullification of a prior judicial decision rather than a statute, the law of *Wolf* v. *Colorado* is as much an "operative fact" as a statute and likewise has consequences which "cannot be justly ignored".

This Court was aware of the constitutional questions in *Chicot* and nevertheless held that a balancing of all considerations should result in the application of settled principles of res judicata. Thus, the bondholders in the *Chicot* case were not allowed to challenge the decree on collateral attack, notwithstanding that an intervening decision of this Court had held that the statute under which their rights had previously been declared was unconstitutional.

Petitioner would distinguish the instant case from *Chicot* on the ground that, since this is a habeas corpus case, principles of res judicata relied upon there are not applicable here (Br. pp. 7-8). He thus seeks to avoid any consideration of the impact of the final judgment in this case by arguing, in effect, that a habeas corpus court must consider each application for a writ as if the peti-

tioner were being tried anew each day that he is imprisoned.[5] The thrust of this contention is that there is really no issue of retroactivity in a case such as this since there is no significance to the existence of a final judgment. Such an argument, of course, totally disregards both the equitable nature of the writ of habeas corpus and the necessity for a habeas corpus court, in the exercise of its discretion, to consider the social interest in the finality of judgments.

This Court long ago observed that "[t]he power conferred on a federal court to issue a writ of *habeas corpus* . . . is not unqualified, but is to be exerted in the exercise of a sound discretion." *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17 (1925). And, as this Court has more recently declared:

> "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243 . . . habeas corpus has traditionally been regarded as governed by equitable principles." *Fay* v. *Noia*, 372 U. S. 391, 438 (1963).

See also Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 438 (1961). In view of the equitable nature of the writ, a balancing process such as that suggested in *Chicot* is particularly appropriate to a determination of whether *Mapp* should be applied retrospectively.

Furthermore, although the nature of the writ dictates that a judgment of conviction may always be subject to attack on habeas corpus, this in no way means that the Court must ignore the significance of the valid final judgment. *Fay* v. *Noia*, *supra*, does not suggest otherwise. Indeed, as this Court observed in *Noia*, the principle that res judicata is inapplicable in habeas proceedings is "really but an instance

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[5] This argument is made explicitly by the dissent in the Court below (R. 271, 278). See also Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 Va. L. Rev. 1115, 1117 (1964).

of the larger principle that void judgments may be collaterally attacked." 372 U. S. at 423. It is implicit in this statement that, when a final judgment is not void *ab initio*, the policies underlying the doctrine of res judicata are highly relevant to a determination of whether a new rule of law should be retrospectively applied. A judgment which was unquestionably valid when rendered and which became final before the law was changed carries a strong presumption of continued validity. In the absence of overriding societal purposes that can be achieved only by upsetting such a judgment, this presumption cannot be overcome.

The weight to be given a final judgment, even on habeas corpus, is illustrated by the case of *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir), *cert. denied* 314 U. S. 678 (1941). Warring was convicted in 1939 of four counts of criminal contempt. In reliance upon this Court's interpretation of the federal contempt statute, he entered a plea of guilty. In 1941, this Court overruled its prior decision defining the limits of the federal contempt statute and so changed its interpretation that Warring could not have been convicted subsequent to the overruling decision.

The Circuit Court held that habeas corpus would not lie to nullify what was a valid judgment at the time it was rendered. The Court did not view the case in terms of whether Warring could be convicted under the new law. Rather, it applied a balancing process, including a consideration of the policies underlying the doctrine of res judicata. Focusing on the significance of the final judgment and concluding that under any realistic view it was validly rendered, Judge (later Chief Justice) VINSON stated in pertinent part:

> "These considerations [of the nature of the law and its administration] should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if

the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, so that we may have our rules of the game as we go.

We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity for that, in turn, would be downright chaotic." *Id.* at 646-47.

The same approach was recently employed by the Court of Appeals for the Second Circuit in *United States* v. *Sobell*, 314 F. 2d 314 (2d Cir.), *cert. denied* 374 U. S. 857 (1963). In concluding that an overruling decision of this Court should not be applied retroactively on collateral attack under 28 U.S.C. § 2255 so as to upset a valid final judgment, Judge FRIENDLY stated for a unanimous court:

> "There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would

> cause 'litigation in these criminal cases [to] be interminable' 332 U. S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the inability of the Government to discharge the duty of protection which it owes to all its citizens." *Id.* at 324.

Having thus rejected the argument that there is something in the nature of habeas corpus which requires a court to look at the case as if the petitioner were being retried each day of his detention, Judge FRIENDLY went on to discuss the proper approach that a habeas corpus court should follow in exercising its discretion:

> "When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment." *Id.* at 325 (Citations omitted).

## B.

### A balancing of the relevant considerations clearly militates against retroactive application of *Mapp*.

It is clear that, on balance, the new rule of law announced in *Mapp* v. *Ohio* should not be retrospectively applied. Strong reliance upon the overruled decision and the potential disruptive effect on the administration of criminal justice, coupled with the fact that a retrospective application would not in any sense further the purpose of the new rule, far outweigh the claimed "right" of the petitioner, a "right" which does not even call into question the fairness of the trial by which he was convicted and which was not ever considered a right until the decision in *Mapp*.

Thus, the circumstance that evidence which was properly admitted at petitioner's 1951 trial might not be admissible if he were retried today is not sufficient reason for sustaining the writ in the face of the compelling social interests which favor non-retroactive application of the new rule established by *Mapp*.

**1. Justifiable reliance.**

One of the most significant considerations in determining whether a new rule of law is to be applied prospectively or retrospectively is the extent of legitimate reliance by the parties on the old law.[6] It is clear that in any trial conducted prior to *Mapp* there was considerable and justifiable reliance by the state judicial system upon this Court's ruling in *Wolf* v. *Colorado*, which specifically held that the introduction of illegally seized evidence at a state trial was no constitutional bar to a valid judgment.[7] For this Court now to apply *Mapp* retrospectively and nullify petitioner's conviction would be to hold that the state courts should have done something which this Court had

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[6] See, *e.g.*, Memorandum of Solicitor General (later Mr. Justice) Jackson for the Commissioner of Internal Revenue in Reply to Petition for Rehearing in *Helvering* v. *Gerhardt*, 304 U. S. 405, *rehearing denied* 305 U. S. 669 (1938) (No. 779, Oct. Term 1937). The Government there took the position that this Court has the power to limit the retroactive effect of an overruling decision but that, on balance, the case before the Court was not an appropriate one for the exercise of the power because the petitioners there had no legitimate claim of reliance upon an overruled decision. *Id.* at 9-16. See also 1A MOORE, FEDERAL PRACTICE 4082-85 (1961).

[7] We do not concede that the evidence introduced at petitioner's trial was the product of an illegal search. Indeed, the State has never been called upon to produce evidence relating to probable cause or consent. *Cf.* Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 338-39. We do not, however, claim equitable standing for the actions of the police in searching petitioner's apartment (*cf.* Pet. Br., p. 13).

plainly told them they were not constitutionally required to do.[8]

Another important element of reliance in the instant case is that of the prosecutor. The District Attorney, prior to *Mapp*, undoubtedly prepared his case on the basis of what this Court had told him was the applicable law. In doing so, he knew that he could use the evidence now objected to by petitioner as an integral part of his case, irrespective of the means by which it had been obtained. This permitted him to prove his case without introducing other evidence which might, in his judgment, have been merely cumulative and which the passage of time would, in all probability, make inaccessible if a retrial were ordered. The reliance is, therefore, clear. The injury resulting from retrospective application of *Mapp* would thus be substantial—injury to the People of the State of New York in the inability to impose criminal responsibility upon a violator of their laws.

**2. The disruptive effect on the administration of criminal justice.**

One obvious result of holding *Mapp* retroactive would be the possible nullification of a substantial number of state convictions.[9] The fact that a significant number of

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[8] Petitioner argues that it would be "manifestly absurd" to say that he knew or should have known of his right to be tried free from any tainted evidence (Br., pp. 11-12). There are obviously two sides to this argument. If it would have required "clairvoyance" on the part of the petitioner to know of this right, it would likewise impose a requirement of clairvoyance on the State to hold that the judgment is invalid because the State knew or should have known of such a right. The simple fact is that there was no such "right" until *Mapp*. To the extent that petitioner contends that the State should have known of the requirement of the exclusionary rule, the same knowledge must be imputed to petitioner.

[9] Even the monograph of Judge Sobel, to which petitioner refers (Br., pp. 14-15), observes that an issue of search and seizure was present in approximately 10 per cent of all cases which came before him after January, 1960.

convictions would be immediately affected is, however, but a single aspect of the chaos which would result from such a holding.

To hold the *Mapp* decision applicable on this habeas corpus proceeding is tantamount to telling the state courts that they must not only decide every federal question correctly at the time of the trial, but must also anticipate any federal claim that might be raised in the future, and must in addition decide those claims correctly. In short, it would place the state courts in an impossible position—theoretically burdened with primary responsibility for administration of the criminal law (see *e.g., Murphy* v. *Waterfront Commission,* 378 U. S. 52 [1964]; *Abbate* v. *United States,* 359 U. S. 187, 195 [1962]), yet faced always with the knowledge that their sanction for one who violates the criminal law can never be regarded as having any finality.

The result would be a decidedly detrimental effect on the future development of the criminal law. In addition to the subversive effect upon the responsibility of a trial judge faced with a difficult question and constantly aware that his ruling carries little finality, it might also lessen the incentive of a defense counsel to challenge an existing rule of law in a developing area—a different course could be pursued at the trial and the challenge could always be made on habeas corpus.

If the *Mapp* decision is applicable in this case, for example, then presumably any subsequent decision redefining the scope of an unconstitional search and seizure would also be applicable on habeas corpus. Similarly, any new decision of this Court aimed at raising the standard of police practices would also be applicable on habeas corpus—even if the question had never been raised by the petitioner at his trial or on appeal, and regardless of whether the petitioner's trial had been a procedurally fair one.

Application of the exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted prisoner who seeks the benefit of the new rule on habeas corpus—advantages which he would not have had at his trial had the search and seizure issue been litigated at that time. Both on the collateral attack itself and, if that is successful, upon retrial of his case, the prisoner will benefit by a delay in litigation of his claim. A claim of illegal search and seizure is one which ordinarily turns on contested facts not susceptible of documentary proof. Although the burden of proof is upon the petitioner in a habeas corpus proceeding, *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69 (1938), the practicalities of rebutting a claim will usually require the government to produce its own witnesses. The question of whether there was probable cause for arrest without a warrant, for example, can practically be resolved only by requiring the government to show the facts upon which its agents acted. Similarly, the question of whether there was consent to a search will usually have to be resolved by accepting one of two irreconcilable versions of the facts. As to either issue, it is clear that the prisoner stands to benefit by delayed litigation, with the inevitable absence of government witnesses and loss of other evidence. As Judge FRIENDLY noted in *United States* v. *Sobell*, 314 F. 2d 314, 325 (2d Cir.), *cert. denied* 374 U. S. 857 (1963):

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

See also Amsterdam, *Search, Seizure, and Section 2255*, 112 U. Pa. L. Rev. 378, 387-88 n. 43 (1964); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 517-18 (1963).

On retrial of a case, too, where collateral attack has succeeded, the passage of time would work to the accused's advantage. As the majority below indicated (R. 268-69), it is reasonable to suppose that there may have been many state convictions in which prosecutors, pursuant to the rulings of this Court, relied upon illegally obtained evidence without making use of other incontrovertible proofs —not now available due to death of witnesses or other circumstances—simply because the other proofs would have been merely cumulative. Particularly in narcotics cases, where search and seizure issues frequently arise, the key government witnesses are often "special employees"—available at the time of the initial prosecution, but not easily found many years later. See Amsterdam, *loc cit. supra* at 387 n. 42 (1964).

Another problem is that of the effect of a holding of retroactivity in this case upon the achievement of the underlying purposes of the criminal law itself. While there are a number of more or less conflicting theories as to the proper aims of the criminal law, there can be no doubt but that concepts of deterrence (of prospective law-breakers), restraint (by imprisonment, where necessary to protect society from proven law-breakers), and rehabilitation (of past law-breakers) are central to any modern system of sentencing and treating offenders. The prisoner who seeks to raise a claim of illegal search and seizure on habeas corpus is one who has been proven beyond a reasonable doubt, by reliable evidence, to be one of a class of persons whom society has found should be subjected to imprisonment in order to restrain and (if possible) rehabilitate him, and in order to deter others from engaging in similar anti-social conduct.[10]

None of those three essential functions will be furthered by a holding that a *Mapp* claim is available on habeas

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[10] See Amsterdam, *loc. cit. supra* at 387 (1964).

corpus where not raised at trial. The resultant undercutting of the restraint function is obvious. As to the effects of such a holding upon the deterrent and rehabilitative functions, it is plain that they are not advanced by long delayed litigation of a claim which does not go either to questions of guilt or innocence or to questions of trial fairness. Professor Bator has written particularly cogently on this subject:

> "Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all. A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of conviction, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibilities." Bator, *loc. cit. supra* at 452.

### 3. The purposes of the *Mapp* rule cannot be achieved by its retroactive application.

In *Mapp* v. *Ohio* this Court emphasized that the primary reason for imposing the exclusionary rule upon the states is to deter law enforcement officials from making unreasonable invasions of personal privacy (367 U. S. 643 at 656):

> "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Elkins* v. *United States*, [364 U. S. 206] at 217."

The deterrent purpose would not be served by application of the exclusionary rule to past trials since it is self-evident that past conduct cannot be deterred. To the extent that the exlusionary rule serves as an effective deterrent to unlawful police conduct it is because the police, after *Mapp*, act with the knowledge that the fruits of illegal searches will not be admissible in criminal trials.[11]

The deterrent purpose of the exclusionary rule has, of course, been a focal point for a number of courts which, presented with *Mapp* claims in post-conviction proceedings, have held that the rule should not be applied retroactively to judgments of conviction which had become final prior to *Mapp*. See, in addition to the opinion below, *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11, 17-19 (5th Cir. 1963), *cert. granted* 377 U. S. 930 (No. 95, Oct. Term 1964); *Commonwealth ex rel. Wilson* v. *Rundle*, 412 Pa. 109, 194 A. 2d 143, 146-50 (1963); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 675 (1963) (citing *State* v.

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[11] Indeed, the evidence indicates that police conduct in the search and seizure area has been notably improved since the *Mapp* rule was announced. See, *e.g.*, Kamisar, *Public Safety, Individual Liberties: Some "Facts" and "Theories"*, 53 Jour. Crim. Law, Criminology & Police Science 171 (1962).

[*James*] *Smith*, 37 N. J. 481, 483 *et seq.*, 181 A. 2d 261, 263 *et seq.* where the purposes of the rule are discussed at some length by Chief Judge WEINTRAUB); *State ex rel. Beltkowski* v. *Tahash*, 266 Minn. 182, 123 N. W. 2d 207, 209 (1963), *cert. denied* 375 U. S. 947 (1963), *rehearing denied* 375 U. S. 989 (1964).

This is also the view taken by most of the contemporary commentators. Professor Freund, for example, has written that "[s]ince the new evidentiary rule goes not to the intrinsic fairness of the trial but to an effective sanction for the enforcement of rules of police conduct, and since that sanction will apply prospectively, the compulsion to apply the exclusionary policy retrospectivly is relatively weak; latitude here [as with respect to the development of constitutional boundaries in the search and seizure field, see *Ker* v. *California*, 374 U. S. 23 (1963)] may well be left for local option." Freund, *New Vistas in Constitutional Law*, 112 U. Pa. L. Rev. 631, 637 (1964). *Accord*, Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150, 171-72 (1962); Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 317, 338-42; Bender, *The Retroactive Effect of an Overruling Decision; Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907, 942-43 (1962); Note, *Collateral Attack of Pre-Mapp* v. *Ohio Convictions Based on Illegally Obtained Evidence in State Courts*, 16 Rutgers L. Rev. 587 (1962).

Deterrence of unlawful police conduct has not provided the sole justification for overriding the normal common law rules governing the admissibility of inherently reliable evidence where that evidence has been obtained by unreasonable search and seizure. The *Mapp* opinion pointed particularly to another consideration—"the imperative of judicial integrity" (367 U. S. at 659, 660; and see *Elkins* v. *United States*, 364 U. S. 206, 222 [1960]).

Thus, the belief that courts should not condone illegal police conduct has long been urged as a reason for adoption of the exclusionary rule. See *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911-12 (1955). Like the purpose of deterrence, however, it would not be furthered by reopening past convictions. Surely the integrity of state courts which acted pursuant to the common law rules of admissibility and to this Court's decision in *Wolf* v. *Colorado* is not to be "vindicated" through a reopening of state court final judgments by federal habeas corpus courts.

Judicial integrity in a somewhat different sense would, however, be adversely affected by a decision which held the exclusionary rule applicable to pre-*Mapp* state convictions. One of the functions of the decisions of this Court is surely to provide a guide for future conduct. During the period 1949 to 1961 no less than 24 states conducted criminal prosecutions in accordance with the decision in *Wolf* v. *Colorado*.[12] To hold that the reliance of state courts upon that decision was wholly misplaced is to question the precedental value of any new decision in the criminal law field. Indeed, a retroactive application of *Mapp* would seriously undermine the integrity of the courts by undermining public confidence in judicial decisions.

Similarly, to the extent that "the avoidance of needless conflict between state and federal courts" (367 U. S. at 657-58) is also a purpose of the *Mapp* decision, it too would be frustrated by retroactive application of the exclusionary rule. Nothing could be more subversive of a healthy federalism than a holding that any subsequent decision of this Court would automatically subject a state criminal conviction to the possibility of nullification by a federal habeas corpus court, irrespective of the fact that there

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[12] See the appendix in *Elkins* v. *United States*, 364 U. S. 206, 224-25 (1960).

was a valid final judgment prior to the change in the law and irrespective of the fact that the issue was never raised in the state courts before final judgment.

### C.

### Non-retroactive application of *Mapp* is fully consistent with decisions of this Court.

In cases such as *Eskridge* v. *Washington*, 357 U. S. 214 (1958), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), it is clear that retroactive application of a new rule was justifiable. In those cases, the claimed violation of the petitioners' rights had deprived them of a fair opportunity to litigate the question of their guilt or innocence. In such cases the defendant was afforded "no process of law"[13]—the judgment was, in effect, void *ab initio*, and thus subject to attack on habeas corpus just as any void judgment is always open to collateral attack. *Fay* v. *Noia*, 372 U. S. 391, 423 (1963). In the instant case, even the petitioner does not contend that he was denied a fair opportunity to contest his guilt or innocence at his 1951 trial.

The focus was clearly on fundamental fairness in *Eskridge* v. *Washington*, *supra*, which applied the rule established in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), to a past conviction. In *Griffin*, this Court, finding that appellate review had become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant, concluded that the due process and equal protection clauses of the Fourteenth Amendment required that indigent defendants be furnished with a trial transcript

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[13] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60. See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-41.

(or an adequate substitute therefor), where such a record was a prerequisite to full appellate review. The Court thus held that a defendant's lack of material wealth "could not be used as a basis to deprive a defendant of a fair trial." *Id.* at 17.

Not only was the element of trial fairness an important one favoring retroactivity in *Eskridge*, but those factors which strongly militate against such an application in the instant case were much weaker in *Eskridge*. Thus, for example, any claim of reliance by state officials in *Eskridge* could only have been based upon absence of any constitutional rule regarding the rights of an indigent defendant who wished to appeal his conviction. Moreover, the disruptive effects of applying *Griffin* retroactively were insignificant compared to those which would follow a retroactive application of *Mapp*. There is no problem of delay in litigation in the *Eskridge* situation, since the record will clearly show whether or not a transcript was provided upon request. Even if no such transcript was initially provided, compliance with *Griffin* requires only an appeal on an existing record, not a new trial. Furthermore, since the *Griffin* rule was totally unrelated to the conduct of a trial, its retroactive application did not undermine the confidence of state court judges in the decisions of this Court, nor undercut the State's primary responsibility for administration of the criminal law.

Similarly, in *Gideon* v. *Wainwright*, *supra*, this Court found it fundamental that a defendant "cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The right asserted in *Gideon* is deemed so fundamental that a judgment obtained in violation thereof is void *ab initio*. In *Gideon*, unlike the instant case, the element of reliance was weak. For, despite this Court's opinion in *Betts* v. *Brady*, 316 U. S. 455 (1942), a long line of cases had characterized the right to counsel as fundamental. *Gideon* v. *Wainwright*, *supra* at 341, 343-344 and cases cited therein.

Most importantly, however, the *Gideon* rule reflects the general belief that it is simply unfair to hold a man in prison where he has not had a fair opportunity to litigate the question of his guilt or innocence. Despite some disruptive effects upon the administration of criminal justice, on balance it is clear that a retroactive application of the rule established in *Gideon* was justifiable.[14]

In *Jackson* v. *Denno*, 378 U. S. 368 (1964), this Court was concerned with the fairness of the New York procedure for determining the voluntariness of a confession and with the implications of that procedure for the fairness of the trial itself. The Court held that a procedure under which the jury simultaneously considered the question of the voluntariness of the defendant's confession as well as the ultimate question of guilt or innocence resulted in an unfair determination of both issues. Thus, although there was some element of reliance upon this Court's decision in *Stein* v. *New York*, 346 U. S. 156 (1953), the *Jackson* decision was nevertheless applied retroactively.[15]

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[14] The rule requiring counsel at trial was actually applied retroactively in the *Gideon* case itself, which arose on habeas corpus. See also *Doughty* v. *Maxwell*, 376 U. S. 202 (1964); *United States ex rel. Durocher* v. *LaVallee*, 330 F. 2d 303 (2nd Cir.), *cert. denied* 377 U. S. 998 (1964).

[15] The *Jackson* decision itself was made in a habeas corpus case. In addition, the Court applied the decision to at least one other past conviction, vacating the Circuit Court's decision in *United States ex rel. McNerlin* v. *Denno*, 324 F. 2d 46 (2d Cir. 1963), and remanding the case to the District Court for further proceedings not inconsistent with the *Jackson* opinion. *McNerlin* v. *Denno*, 378 U. S. 578 (1964). The New York Court of Appeals has recently expanded the scope of coram nobis to provide for a hearing in the trial court on any *Jackson* claim where the question of voluntariness had been submitted to the jury. *People* v. *Huntley*, —— N. Y. 2d —— (Docket No. 391, dec'd Jan. 7, 1965). Compare *People* v. *Muller*, 11 N. Y. 2d 154, 182 N. E. 2d 99, *cert. denied* 371 U. S. 850 (1962), denying post-conviction relief for a *Mapp* claim where the question had not been raised prior to final judgment.

The balancing process suggested herein is entirely consistent with the coerced confession cases decided by this Court on habeas corpus, and the reliance of the dissent below upon a claimed analogy to such cases (R. 271, 276) is wholly misplaced. Whereas the use at trial of illegally seized evidence did not, prior to *Mapp*, violate any recognized right of a defendant, the use of a coerced confession has historically made a trial a fundamentally defective proceeding and rendered the resulting judgment void *ab initio*. The principle has long been established, in both English and American law, that a defendant is deprived of due process of law where an involuntary confession is admitted into evidence against him at trial. *Bram* v. *United States*, 168 U. S. 532, 545 (1897); McCormick, Evidence § 111 (1954). Thus, in *Brown* v. *Mississippi*, 297 U. S. 278 (1936), the Court spoke of the use of a coerced confession as "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id.* at 286. So serious is the wrong that even a defendant's failure to pursue the proper state procedural remedy for testing the voluntariness of a confession will not bar the federal courts from considering the claim on habeas corpus, at least where the failure does not constitute a deliberate by-passing of the State courts. *Fay* v. *Noia*, *supra*. As this Court held in the *Noia* case, the use of a coerced confession makes a trial such a "fundamentally defective" proceeding as to render the resulting imprisonment intolerable. *Id.* at 414-415.

Moreover, considerations of reliance and of the disruptive effect upon the administration of criminal justice are substantially different in coerced confession cases from what they are in the instant case. Coerced confessions have always been inadmissible at trial. It is one thing to say that a trial court applied the wrong standard in examining an issue which it knew it had to test, and which, in most cases, could be reexamined on the basis of an existing

record, thus avoiding most problems of delayed litigation which are present in the instant case. It is quite a different thing to say that a trial court should have initially examined an issue which this Court had specifically said it was not constitutionally required to examine, and which the parties to the litigation did not even ask it to examine.

In asserting that the Court in *Mapp* did not create a new right "but merely removed a procedural bar to the assertion of an existing one" (Br., p. 16), petitioner wholly ignores the fact that *Wolf* v. *Colorado* had specifically held that there was no "right" of a defendant to have illegally obtained evidence excluded at trial. Instead, invoking the Blackstonian fiction of discovered law (Br., pp. 6-7, 17), petitioner asks this Court to accept "the ancient dogma that the law declared . . . had a Platonic or ideal existence before the act of declaration". *Great Northern Railway* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358, 365 (1932). This "dogma" completely ignores the realities of the judicial process. As Mr. Justice HOLMES said, "The common law is not a brooding ominipresence in the sky." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917) (dissenting opinion). On the contrary, the common law—the law as developed by the courts—is in a very real sense "made" by judges.[16]

When this Court overrules a prior decision, it is unquestionably making new and different law. This is vividly demonstrated by the very case at bar. *Wolf* v. *Colorado* was no less the law for its day than *Mapp* v. *Ohio* is for today. The very process by which *Mapp* replaced *Wolf*, a flexible process allowing for creative growth of the law

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[16] Mr. Justice Cardozo, for example, recognized this when he wrote, "We must get away . . . from the notion that law is fixed and immutable, that the conclusion which the judge declares, instead of being itself more or less a tentative hypothesis, . . . has a genuine pre-existence, that judgment is a process of discovery, and not in any degree a process of creation . . . ." THE GROWTH OF THE LAW, pp. 53-54 (1924).

to solve contemporary problems, emphasizes the necessity of recognizing that courts do indeed make law, not "discover" it.

This reality was recognized by this Court in declining to give retroactive effect to an overruling decision in the *Chicot* case and is equally applicable here. As this Court has said, legal fictions are not to be introduced into habeas corpus. *Fay* v. *Noia*, 372 U. S. 391, 439 (1963). A determination of whether to give retroactive effect to the *Mapp* rule, a question with enormous implications for the future course of American criminal justice, is surely not to be made on the basis of a fiction.

The issue in the instant case is not whether this Court should "prospectively overrule" a prior decision. The theory of prospective overruling is designed to limit the effect of an overruling decision upon the parties to the litigation which results in the declaration of a new law. Whether *Wolf* should have been prospectively overruled could have become an issue only in the *Mapp* case itself.[17] The issue in this case, however, is whether the new law declared in *Mapp*, having already been applied to the litigants in that case, must be applied to all cases, past as well as present, or may be limited to those cases in which no final judgment had been rendered prior to *Mapp*.

Petitioner's reliance on cases such as *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch) 102 (1801), is wholly misplaced—they stand simply for the principle that an appellate court, on direct review of the decision of a lower court, will apply the law as it exists at the time of review.

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[17] Although petitioner alludes to the constitutional restriction upon the rendering of advisory opinion (Br., p. 7), that restriction—implicit in the requirement of a case or controversy (U. S. Const. Art. III, § 2)—is plainly inapplicable in the instant case. This Court must decide the retroactivity issue in order to dispose of the proceedings at bar.

In the *Schooner Peggy* litigation, for example, subsequent to the lower court decision ordering that the schooner be forfeited to the United States as a lawful prize, this country had entered into a treaty with France which provided in part that any captured property not yet definitely condemned was to be restored. Chief Justice MARSHALL's opinion was phrased in terms of the obligation of an appellate court to apply the existing law where a case has not yet reached final judgment:

> "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." *Id.* at 110.

The same reasoning which guided Chief Justice MARSHALL in the *Schooner Peggy* was subsequently applied by this Court in cases arising under the National Prohibition Act, where prosecutions begun under that Act were held to have been abated where final judgment had not yet been reached at the time the Twenty-first Amendment was ratified. *Chambers* v. *United States,* 291 U. S. 217 (1934); *Massey* v. *United States,* 291 U. S. 608 (1934). The principle was most recently applied by this Court in *Hamm* v. *City of Rock Hill,* —— U. S. ——, 85 S. Ct. 384 (1964), where the Civil Rights Act of 1964 was held to have abated convictions based upon state trespass statutes.

Although the dissenting justices in *Hamm* disagreed with the applicability of the principle of abatement to the judgments under review, both the majority opinion and the dissents proceeded on the theory that the question was limited to whether the Civil Rights Act of 1964 abated prosecutions where the judgments had not yet become final.

The language of these cases, carefully confining the application of new law to cases which have not yet reached final judgment, clearly implies that where a judgment has reached finality and cannot be said to be void *ab initio* it should not be upset. Indeed, a consideration of the principle applied in these cases indicates that the problem of "drawing lines" suggested by the dissent below (R. 271, 279-81) is not at all a difficult one. It is logical, in view of the well-warranted emphasis upon finality of judgments which has historically been a part of our legal system, to hold that a state conviction which had reached finality prior to the *Mapp* decision should not be open to collateral attack on habeas corpus.

Such a holding would be wholly consistent with this Court's consideration of the merits of search and seizure claims raised in state trials held prior to *Mapp* where the case reached the Court on direct review after *Mapp* was decided. See *Stoner* v. *California*, 376 U. S. 483 (1964); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Ker* v. *California*, 374 U. S. 23 (1963). Any such case could have been the vehicle for overruling *Wolf* v. *Colorado*, at least if sufficient objection had been made at trial to preserve the constitutional question for review, as was done in the *Stoner*, *Fahy* and *Ker* cases. See *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11, 19 (5th Cir. 1963), *cert. granted* 377 U. S. 930 (1964) (No. 95, Oct. Term 1964); Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 112 U. Pa. L. Rev. 650, 676-77 (1962).

## CONCLUSION

**For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.**

Dated: New York, New York, January 20, 1965.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1964

No. 578

GEORGE ANGELET,

*Petitioner,*

*vs.*

EDWARD M. FAY, Warden of
Green Haven State Prison,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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The development of a new fundamental constitutional right, such as exclusion of unlawfully seized evidence, is distinct from an alleged "fundamental right" to review previously closed cases thereunder. In judging whether the latter right should obtain under *Mapp* v. *Ohio*, the Court should consider that reopening and re-examining countless closed cases in the light of *Mapp* to determine which defendants' past trials elicited unlawfully seized evidence would impair the nationwide administration of justice, now and in the future, to the detriment of other defendants with more urgent claims ..... 5

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IN THE

# Supreme Court of the United States

**October Term, 1964**

**No. 578**

GEORGE ANGELET,

*Petitioner.*

*vs.*

EDWARD M. FAY, Warden of Green Haven State Prison,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

### Questions Presented

1. Do prisoners presently in custody pursuant to criminal judgments that were considered final before the decision in *Mapp* v. *Ohio* have a constitutional right to have their cases reviewed on the basis of *Mapp*?

2. Does every change in conceptions of fundamental constitutional rights entail a fundamental right to re-examination of previously closed cases to determine whether the newly defined right was accorded in the past?

## Interest of *Amicus*

The National District Attorneys' Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement in the states. The questions presented in the instant case have been answered in the negative by every state court that has treated them, and the Association believes that overturning these decisions would needlessly and harmfully disrupt the administration of justice throughout the nation. Accordingly, the Association files the instant brief, with the consent of the parties; another brief, identical in material respects, will be filed in the companion case, *Linkletter* v. *Walker*, No. 95, October Term, 1964. Pursuant to the gracious permission of the Court and consent of the parties, counsel representing *amicus* will present oral argument on behalf of respondent in the instant case, and in *Linkletter*.

## Summary of Argument

The evolution of the exclusionary rule of *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is dramatic proof of Holmes's teaching that change is the law of life and the life of the law. In two decades, the exclusion of unlawfully seized evidence was transformed from a judge-made rule of evidence, freely adopted by some states, into a basic right, binding on all states by authority of the Fourth Amendment. This metamorphosis into a right now deemed "fundamental" to criminal justice does not, however, imply a "fundamental right" to reopen cases that were disposed of at an earlier state of the development. It is false to conceive of a new right, declared in a case that overrules a prior decision, as always existing. Further, the history of the exclusionary rule up to the decision in *Mapp* v. *Ohio* shows that the

prospect of retroactivity played no part in the evolution of the rule, and would have inhibited that development. Unanimous state holdings after *Mapp*, supported by decisions in the great majority of the federal circuits, demonstrate that the retroactivity sought by petitioner is not deemed basic to our concepts of justice, and that continuing the validity of pre-*Mapp* judgments without re-examination is not "in violation of the Constitution" [see 28 U. S. C. §2241].

The few decisions to the contrary incorrectly perceive "unfairness" in denying relief to a minority of pre-*Mapp* prisoners, who supposedly would be free if *Mapp* governed. It is reasonable to conclude, however, that if the offenders whose cases were closed before *Mapp* and are still in custody had committed their crimes and been prosecuted today, the evidence in question would have been admissible, and the convictions secure. Moreover, absent here are the reasons for adopting retroactivity in situations in which new constitutional rights have been applied to previously closed cases, such as the right to perfect an appeal regardless of indigency, to have counsel at trial, and to challenge a confession in the absence of the jury. The reasoning of those decisions forbids present reliance on the validity of prior judgments. In each instance, the defendant never had a fair hearing of issues that were always in the case, including guilt or innocence, and deprivation of constitutional rights that were announced prior to trial. By vacating the judgment, fair trial can be restored. Here, however, the lost right—privacy—cannot be restored. In short, constitutional principles leave this Court a choice whether to apply *Mapp* retroactively.

This choice should be determined by the effects of such a holding. Serious harms to the administration of justice,

to the detriment of defendants with more important interests, counsel against retrospective application of *Mapp*.

The evils of retroactivity derive from its enormous scope, and the complexity of the procedures for implementing it. Countless past cases would be subject to cumbersome re-examination, in states that had no exclusionary rule before *Mapp*, in states whose application of exclusion differed from present federal standards, and in the federal jurisdiction. A requirement of reviewing these thousands of cases to determine whether the subsequently announced right of exclusion was "violated" in some would place an intolerable burden on the improving administration of justice. At a time when the attention of judges, defense lawyers, police, and prosecutors is turned to the urgent present and future application of the profound recent changes in criminal law, retroactivity of *Mapp* would distract materially from these important tasks by requiring review of less pressing claims.

Retroactivity of the exclusionary rule, imposed because of the false assumption that any "fundamental" right is retroactive, would also require continuous reopening and re-examination of judgments hereafter, with every future change in the prevailing interpretation of specific "fundamental" Fourth Amendment rights. The continuing evolution of the content of the Fourth Amendment, of which the development of the exclusionary rule is only one aspect, would be impaired by the introduction of this extraneous factor. Pragmatic, day-to-day examinations of the many open constitutional questions that remain in the field of search and seizure should not be inhibited by the unsettling prospect of automatic application of new standards to previously closed cases.

# ARGUMENT

**The development of a new fundamental constitutional right, such as exclusion of unlawfully seized evidence, is distinct from an alleged "fundamental right" to review previously closed cases thereunder. In judging whether the latter right should obtain under *Mapp* v. *Ohio*, the Court should consider that reopening and re-examining countless closed cases in the light of *Mapp* to determine which defendants' past trials elicited unlawfully seized evidence would impair the nationwide administration of justice, now and in the future, to the detriment of other defendants with more urgent claims.**

## A. Constitutional Doctrines Leave This Court a Choice Whether to Apply *Mapp* Retroactively.

### *1. The evolution of the exclusionary rule into a constitutional right shows that a new fundamental right is distinct from an alleged "fundamental right" to reopen previously closed cases thereunder.*

The issue in this case is whether *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is "retroactive": whether because of *Mapp* all "closed" cases, in which the judgments of guilt were rendered and the availability of appeal exhausted before the date of the *Mapp* decision, must now be reopened, and examined under current Fourth Amendment principles. Thus, the concept of retroactivity involved here does not include the relatively few cases in which the judgment of conviction was rendered before, but review on appeal was pending or available at the time of, the *Mapp* decision. In such cases, *Mapp* has universally been held to govern, pur-

suant to the practice of applying newly declared law to matters that are still in the appellate process [see *United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *appeal pending; United States ex rel. Campbell* v. *Rundle*, 327 F. 2d 153 (3rd Cir. 1964); *Thompson* v. *State*, 132 So. 2d 386 (Ala. 1961); *State* v. *Hanna*, 191 A. 2d 124 (Conn. 1963); *State* v. *Del Vecchio*, 182 A. 2d 402 (Conn. 1962); *State* v. *Nelson*, 196 A. 2d 52 (N. H. 1963); *State* v. *Pina*, 383 P. 2d 167 (Ariz. 1963); *Commonwealth* v. *Spofford*, 180 N. E. 2d 673 (Mass. 1962); *Commonwealth* v. *Jacobs*, 191 N. E. 2d 873 (Mass. 1963)], although certain appellate courts, including this Court, require adequate objection or other fact on the record to preserve the question for review [see *Ker* v. *California*, 374 U. S. 23 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *People* v. *Loria*, 129 N. E. 2d 478 (N. Y. 1961); *People* v. *Friola*, 182 N. E. 2d 100 (N. Y. 1962); *State* v. *Valentin*, 174 A. 2d 737 (N. J. 1961); *State* v. *Smith*, 181 A. 2d 761 (N. J. 1962), *cert. denied* 374 U. S. 835 (1963); *Belton* v. *State*, 178 A. 2d 409 (Md. 1962); *Shorey* v. *State*, 177 A. 2d 245 (Md. 1962), *cert. denied* 371 U. S. 928 (1962); *Commonwealth* v. *Raymond*, 194 A. 2d 150 (Pa. 1963); *Commonwealth* v. *Richards*, 182 A. 2d 291 (Pa. Super. 1963); *Ewing* v. *State*, 116 N. W. 2d 7 (Neb. 1962), *cert. denied* 375 U. S. 876 (1963)]. The decision whether *Mapp* should apply to previously closed cases, on the other hand, involves far more complex and challenging questions as to the meaning of the judicial process. The questions presented in the instant case are as significant to the development of the administration of justice as the difficult issues in *Mapp* v. *Ohio*, and require the same careful consideration.

As the extensive discussions in the decision below (R. 261-3) and respondent's brief (pp. 17-23, 32-39) demonstrate, this case cannot be disposed of by a simple holding that *all* constitutional decisions that overrule prior cases are retroactive. It would be meaningless to declare that the new constitutional right of exclusion that was promulgated for the first time in 1961 in *Mapp* always existed, notwithstanding the express holding to the contrary in 1949 in *Wolf* v. *Colorado* [338 U. S. 25 (1949)]. Similarly, it would be a distortion of the development of the exclusionary rule into a constitutional right to conclude that the status of "basic" right automatically means retroactivity. As the following review of the emergence of the constitutional rule of exclusion demonstrates, the growing perception of a need for a particular right in present criminal procedure is distinct from a felt necessity of reopening old cases because of the change in standards.

The exclusion of unlawfully seized evidence was introduced to American jurisprudence in Iowa [*State* v. *Sheridan*, 96 N. W. 730 (Ia. 1903)], and several years later this Court applied the rule to federal courts [*Weeks* v. *United States*, 232 U. S. 283 (1914)]. Thereafter, while Iowa abandoned the rule, and twenty-eight other states expressly rejected it, eighteen voluntarily adopted exclusion [see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39 (1949)]. Thirty-five years after *Weeks*, in *Wolf* v. *Colorado*, the Court held that the Fourteenth Amendment makes binding on the states the right to privacy that is at the "core" of the Fourth Amendment, but the Court's survey of the state decisions, and the availability of other remedies, convinced the Court that exclusion was not "basic to a free society." Eleven years later, however, in *Elkins* v. *United States*

[364 U. S. 206 (1960)], the Court's new census of state decisions showed that several states had adopted the rule after *Wolf* [*id.* at 218-221, 224-234 (1960)], and that the "movement towards the rule of exclusion has been halting but seemingly inexorable" [*id.* at 219]. This rationale contributed to the overruling of the "silver platter" doctrine in *Elkins*. The evolution of the exclusionary rule was completed the next year; in *Mapp* v. *Ohio*, the Court referred extensively to *Elkins* and the shift in state law, and concluded that the "factual considerations" in *Wolf* were now absent [367 U. S. at 651-653, 660], and that exclusion was now fundamental to American criminal procedure.

It is questionable whether the "impressive," "inexorable" experience of the states [see *Elkins* v. *United States*, *supra* at 218-219] that adopted exclusion would have occurred if the state courts and legislatures had contemplated that by contributing to the "fundamental" quality of the rule they would support the drastic requirement, proposed by petitioner here, that all past cases be reopened for scrutiny under the new right. California, whose adoption of the *Weeks* rule in 1955 was cited by this Court in *Mapp* as evidence of its necessity [367 U. S. at 652], might have decided otherwise, since the California exclusionary rule was not applied retrospectively [see *Collins* v. *Webb*, 133 F. Supp. 877 (N. D. Cal. 1955); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956)]. Similarly, the statutory rule enacted in Rhode Island, which this Court referred to as part of the "significant" experience of the states, was limited to prospective operation [see *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956)]. Further, *Mapp* itself was uniformly denied retroactivity by the state courts, including those that voluntarily adopted exclusionary rules before *Mapp*.

The "retroactivity" proposed in the instant case was rejected by all of the state courts that passed upon the issue, the court below, and most of the other circuit courts [see *Angelet* v. *Fay*, 333 F. 2d 12 (2d Cir. 1964), *appeal pending* No. 578, Oct. Term, 1964; *Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963), *appeal pending* No. 95, Oct. Term, 1964; *Reynolds* v. *United States*, 324 F. 2d 371 (5th Cir. 1963); *Sisk* v. *Lane*, 331 F. 2d 235 (7th Cir. 1964); *Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States*, 306 F. 2d 880 (10th Cir. 1962); *Petition of Dirring*, 183 N. E. 2d 300 (Mass. 1962); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 375 U. S. 947 (1963); *People* v. *Muller*, 182 N. E. 2d 99 (N. Y. 1962), *cert. denied* 371 U. S. 850 (1962); *Taylor* v. *People*, 392 P. 2d 294 (Colo. 1964); *Commonwealth ex rel. Wilson* v. *Rundle*, 194 A. 2d 143 (Pa. 1963); *Commonwealth ex rel. Altizer* v. *Hendricks*, 190 A. 2d 348 (Pa. Super. 1963); *Saulsbury* v. *Green*, 195 N. E. 2d 787 (Ohio 1964); *Villasino* v. *Maxwell*, 190 N. E. 2d 265 (Ohio 1963); *Spence* v. *Sacks*, 183 N. E. 2d 363 (Ohio 1962); *Moore* v. *State*, 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963); *State* v. *Smith*, 202 A. 2d 669 (N. J. 1964); see *In re Harris*, 366 P. 2d 305, 309 (Cal. 1961) (TRAYNOR, J., concurring), *vac. other grounds* 374 U. S. 499 (1963); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956); *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956); *contra*: *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963), *cert. denied* 374 U. S. 809 (1963); *Walker* v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963); *California* v. *Hurst*, 325 F. 2d 891 (9th Cir. 1963), *appeal pending* No. 45, Oct. Term, 1964], and, as is noted in the decision below (R. 261-262, 267) and respondent's brief (p. 30), by the thoughtful analysis of most commentators. This overwhelming judicial

and scholarly experience shows that while the *Mapp* rule is now deemed basic to present cases, continuing the validity of pre-*Mapp* judgments undisturbed is not considered "in violation of the Constitution" [see 28 U. S. C. §2241] or "in violation of fundamental law" [see *Fay* v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 832, 834, 842, 846, 829, 849 (1963)]. Petitioner's use of the word "fundamental" to combine the two entirely separate concepts obscures the distinction, and should not be enshrined in the decisions of this Court.

***2. The exclusionary rule is distinguishable from other newly announced constitutional rights that were applied retroactively.***

Stressing the vital distinction between the emergence of a fundamental right, and a "right" to have it applied to earlier cases, does not imply that no constitutional changes should be retroactive. Where appropriate, decisions of this Court have been applied to previously closed cases. But the Court has never held that, as petitioner now argues, in criminal cases all rulings based on the Constitution are, by that same authority, always retrospective, notwithstanding the consequences, and regardless of the policy of the right that is involved. Examination of the situations in which recent constitutional developments have been extended retroactively shows crucial differences from the instant case.

*Griffin* v. *Illinois* [351 U. S. 12 (1956)], involving the right of an indigent prospective appellant to a transcript, has been applied to prior convictions [see, *e.g.*, *Eskridge* v. *Washington State Board of Parole*, 357 U. S. 214 (1958)]. After *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], this

Court reversed a previously closed judgment that was entered without counsel [see *Doughty* v. *Maxwell*, 376 U. S. 202 (1964); see also *United States ex rel. Durocher* v. *La Vallee*, 330 F. 2d 303 (2d Cir. 1964)]. The voiding on post-conviction collateral attack of the "New York" procedure for determining voluntariness [see *Jackson* v. *Denno*, 378 U. S. 368 (1964)] has been interpreted as implying retroactivity [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. JOUR. Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965)]. In those cases, however, the fundamental unfairness of denying to prior defendants the benefits of newly announced rights is clearer than in the instant situation. The wrongs that were perceived in the former three decisions are, and always were, at the heart of the judgment itself, for they precluded fair determinations of vital issues that were always in the case. As to *Griffin*, the appeal that was denied was "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant" [351 U. S. at 18]. According to the rationale of *Gideon*, the community has no cause for confidence in the validity of a judgment rendered against a defendant without counsel, whatever the date of conviction. Claims available to a defendant with counsel, including innocence, procedural errors, and violations of previously declared constitutional rights, were effectively denied by the inherently prejudicial absence of an attorney. Similarly, according to the reasoning of *Jackson*, the defendants in prior New York cases never had a fair hearing on their contentions, which were always part of the case and always recognized by the Constitution, that their confessions were involuntary. Accepting the description of the psychology of jurors that this Court set forth in *Jackson*, this psychological situation ob-

tained before *Jackson*, and the issue of coercion was incapable of fair determination in all pre-*Jackson* cases that used the "New York" procedure.

On the other hand, as the decision below (R. 263-9) and respondent's brief (pp. 29-32) point out, the essential issue in *Mapp* was not whether the defendant had a fair trial leading to a reliable judgment of conviction, but the necessity of fashioning an effective "deterrent safeguard"; "the purpose of the exclusionary rule 'is to deter'" invasions of privacy from occurring before trial, or even when there is no trial [367 U. S. at 648, 656]. The rights violated in the other three cases can be "restored" by allowing an appeal, vacating the judgment and supplying counsel, or granting a hearing as to coercion. But the past violations that would now be alleged on the basis of *Mapp*, even if they could be considered "confirmed" by uncertain attempts to reconstruct forgotten events in these and countless other cases, cannot be erased; the privacy that was invaded cannot be "restored." In the minority of cases in which such violations would be established, vacating the judgments would only be a gratuitous form of "compensation," a type of relief collateral hitherto unknown to the Constitution, and inconsistent with this Court's statement in *Mapp* that compensatory remedies are "futile" for protection of Fourth Amendment rights [367 U. S. at 651-652].

Further, the disruptions of allowing countless claims of past violations of the right to privacy would be tolerated for the sake of a relatively few prior defendants, on the theory that it would be "unfair" to deny those defendants the "relief" they allegedly would obtain if they had been

prosecuted today. However, experience indicates that the evidence of their guilt would still be admissible, because the *Mapp* rule has not been shown to render vital evidence unavailable. It cannot "lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement" [see *Mapp* v. *Ohio*, *supra*, 367 U. S. at 659-660], and that if those defendants' cases had arisen today, the evidence would be unavailable to the police, and inadmissible in court. The opinion in *Mapp* referred to the long history of federal justice under the *Weeks* rule, and the adoption of the rule in many states, including California [see *People* v. *Cahan*, 282 P. 2d 905 (Cal. 1955)]. Seven years' experience under the *Cahan* rule in California led its author to conclude that exclusion did not frustrate law enforcement or obstruct the availability of evidence [see Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 DUKE L. JOUR. 319, 322, 323 (1962)]. This view was reiterated by the Attorney General of California [see letter quoted in Kamisar, *Wolf & Lustig Ten Years Later*, 43 MINN. L. REV. 1083, 1158 (1959)]. An exhaustive study of statistics of arrests and convictions in California under the *Cahan* rule shows no hampering of law enforcement [Kamisar, *Public Safety* v. *Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., CRIMINAL & POL. SCI. 171, 188-190 (1962)]. Thus, if on the issue of "fairness," prosecutions of pre-*Mapp* prisoners are to be treated as though they had occurred under the *Mapp* rule, it appears likely that in the great bulk of present felony cases, including petitioner's, the evidence would be properly admissible, and the convictions secure. While it is true that the police—as distinguished from the trial court and prosecutor—were on notice before *Mapp* that

their conduct was unlawful (see petitioner's brief, pp. 13-14), unlawfulness was not a necessary condition of securing and admitting the evidence. On the other hand, denying a transcript, or an attorney, to indigent defendants, permitting the jury alone to determine voluntariness, or obtaining a confession that was the product of coercion, could not have taken place without violating the Constitution.

In sum, consistently with constitutional doctrines concerning the nature of individual rights and the role of this Court, the Court may choose not to apply *Mapp* retroactively. Petitioner recognizes that "Assuming a latitude of choice, the Court should consider the effect generally of a decision requiring restrospective application" (petitioner's brief, p. 14). The "effect generally" of applying *Mapp* retroactively would be staggering.

### B. Retroactivity Would Place Heavy Burdens on the Nationwide Administration of Justice.

#### *1. All states would be affected.*

Past judgments in every state would be subject to reexamination. The twenty-seven states that at the time of *Mapp* had either no exclusionary rule, or a rule inapplicability to the majority of cases [see *Elkins* v. *United States*, 364 U. S. 206, 224-234 (1960)], would be most affected. Retroactivity would also involve cases in the twenty-three states that adopted comprehensive exclusionary rules before *Mapp* [*ibid.*]. Since all states are now required to apply the same constitutional search-and-seizure standards as the federal courts [*Ker* v. *California*, 374 U. S. 23 (1963)], convicts in the twenty-three pre-*Mapp* "exclu-

sionary'' states would be free to allege variations between those states' previous interpretations of the right to privacy, and this Court's current views [see *Sisk* v. *Lane, supra; California* v. *Hurst, supra; Bates* v. *Dickson,* 226 F. Supp. 983 (N. D. Cal. 1964); *People ex rel. Winkle* v. *Bannan,* 125 N. W. 2d 875 (Mich. 1964); *Moore* v. *State,* 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963)]. Even *Wolf* v. *Colorado* held only the ''core'' of the Fourth Amendment applicable to the states; now, under *Ker,* all the broad federal constitutional principles apply.

### 2. *The number of previously closed state cases to be relitigated would be enormous.*

Although it is clear that all states would be affected by retroactivity, the number of previous state cases that would have to be reviewed cannot be predicted. Accurate estimation requires, preliminarily, knowledge of the number of state prisoners confined at the time of the *Mapp* decision who are still in custody, and the number of defendants who have been re-imprisoned as multiple offenders since *Mapp* on the basis of at least one pre-*Mapp* conviction. The population of state prisons shortly before the *Mapp* decision, at the end of 1960, was 189,907 [U. S. CENSUS BUREAU, 1963 STATISTICAL ABSTRACT OF THE U.S. 163]; the average sentence of prisoners released from state institutions in 1960 was six years and seven months, and the average time served two years and four months [FEDERAL BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS (1960)]. Therefore, perhaps a third to a half of pre-*Mapp* state prisoners are still in custody, in prison or on parole.

In addition to the number of pre-*Mapp* prisoners still in custody, the percentage of these defendants whose cases might have involved search-and-seizure questions must be calculated. In what seems to be a very conservative estimate, a judge of a busy New York trial court has concluded from a study of records of pre-*Mapp* cases in his court that an issue of unlawful or unreasonable search "might have been raised" in about 10% [SOBEL, A COMMENT ON THE LAW OF SEARCH AND SEIZURE (1962), quoted in petitioner's brief, pp. 14-15]. This classification apparently refers to cases in which the defendant may have a claim worthy of careful examination; the percentage of cases in which evidence was produced by a search or seizure must be much greater.

Further, the proportion of search-and-seizure cases may be higher among defendants who are still in custody since 1961 than for pre-*Mapp* prisoners who have been released. The above-cited reports show, for example, that the sentences imposed and time served for narcotics felonies are much higher than the average; in many of these "contraband" cases, the defendants would allege search-and-seizure questions. Also, defendants who declined to acknowledge their guilt, but put the state to the expense of proving it at trial, generally received longer sentences than defendants who pleaded guilty to the same charges; challenges to the use of unlawful evidence would presumably be limited to the former group if *Mapp* were held retroactive, since the latter judgments were based on pleas, not evidence. Thus, while no precise determination can be made of the number of prisoners, presently in custody on the basis of judgments that were considered closed before *Mapp*, who would raise Fourth Amendment claims, there are potentially thousands.

### 3. *The implementation of retroactivity procedurally in these cases would be overburdening.*

Judging the effect of the retroactivity of *Mapp* implies not only consideration of the number of past defendants who would raise search-and-seizure claims, but also analysis of the manner in which the claims would have to be examined and tested. With "federal courts already laboring under congested dockets,"[1] the states would doubtless be given the first "opportunity" of reviewing the mountains of claims of pre-*Mapp* defendants [see *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965); *Jackson* v. *Denno*, 378 U. S. 368 (1964)]. Some defendants' claims might be dismissed upon cursory examination of the court records—for example, if the states were allowed to rule that judgments entered on pleas of guilty should remain closed. Others might be disposed of upon the face of the defendants' applications alone. It

1. The following chart shows the increase in post-conviction collateral applications filed in federal District Courts [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF THE DIRECTOR 144; 1962 REPORT 130; 1959 REPORT 109; *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965)]:

| *fiscal year* | *state prisoner habeas corpus* | *federal prisoner habeas corpus* | *28 U.S.C. §2255 motions* |
|---|---|---|---|
| 1952 | 541 | 406 | 90 |
| 1953 | 548 | 346 | 119 |
| 1954 | 597 | 395 | 263 |
| 1955 | 660 | 362 | 279 |
| 1956 | 734 | 429 | 235 |
| 1957 | 778 | 339 | 231 |
| 1958 | 755 | 408 | 321 |
| 1959 | 822 | 553 | 494 |
| 1960 | 872 | 767 | 538 |
| 1961 | 906 | 860 | 560 |
| 1962 | 1,232 | 866 | 546 |
| 1963 | 2,106 | 862 | 595 |
| 1964 | 3,501 | — | — |

may be presumed, for instance, that state courts would be permitted to follow the practice of the federal District Courts, and require clear factual, rather than conclusory, allegations setting forth a violation of constitutional rights before granting a post-conviction hearing on the defendants' claims. In addition, it would be hoped that the states, like the federal District Courts, would not be required to entertain collateral attacks from persons who are no longer "in custody" [*cf.* 28 U. S. C. §2241]. If state, or federal, courts were required to extend collateral attacks based on *Mapp* to defendants who have served their sentences, or who received suspended sentences, the number of cases would be endless, and the chaos intensified.

Even if the cases described above could be spared the severest rigors of retroactivity, they would still require hours of work by judges and states' attorneys, and perhaps assigned defense counsel, at the lower court and appellate level.

The remaining cases, which would require more careful examination, probably would comprise the bulk of the retroactivity docket. Judging from collateral applications in other areas than search and seizure, prima facie claims of unconstitutionality are easy to compose, even if factual allegations are required. In the instant situation, however, the available records would rarely provide an answer to the claim. In many cases, no appeal was taken, no trial record will be in the files, and stenographic staffs will have to prepare a transcript. In others, the trial minutes will be available, but inconclusive or silent on the issues raised by the application, including not only the alleged unlawful-

ness, but also the question whether there was a "search" or "seizure" within the meaning of the Constitution. In both instances, examination of trial records in the light of the defendant's motion papers would be required. Applied to this examination would be imprecise, often cloudy concepts of the law of search and seizure, including "the troublesome line * * * between mere suspicion and probable cause" [see *Brinegar* v. *United States*, 338 U. S. 160 (1949)], "consent," the permissible scope of a search pursuant to an arrest, and the moment when evidence obtained after an unconstitutional search is "purged of the primary taint" [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)]. At the present stage of Fourth Amendment jurisprudence, this examination would proceed without guidance from this Court whether the states are free to apply varying versions of the "harmless error" doctrine to these collateral attacks. Even assuming, however, that state courts would be able to adopt the reasonable course of denying post-*Mapp* claims of pre-*Mapp* prisoners if the trial record contains clear proof of guilt without the allegedly tainted evidence [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S. 947 (1963)], a great proportion of applications would still require further attention, particularly in "contraband" cases.

If respondent's sound analysis (brief, pp. 24-25) were accepted, state courts would also be permitted to apply procedural rules requiring adequate objection at trial (see p. 6, *supra*). Even with such reasonable requirements, however, trial minutes would have to be reviewed to determine

the adequacy of the challenge, and the litigation would continue in the appellate courts. In addition, the number of cases in which sufficient objection was found would be large; it may be noted that in direct appeals from pre-*Mapp* trials, state courts have been liberal in discerning the required challenges in the record (see p. 6, *supra*).

Such applications, having passed through the tedious initial scrutiny, would require an evidentiary hearing as to the merits of the constitutional claim. Absent a concession by the state, it could not be assumed, in the instant case or any other, that the record would be conclusive as to the complex factual and constitutional questions raised.

In connection with the hearings, probably the states would be allowed to place the burden of proof of establishing unconstitutionality upon the defendant, as in federal habeas corpus. This would be small comfort to the administration of justice. Police officers and prosecutors would still be required to investigate, and reconstruct as witnesses, events previously considered closed. Court calendars would be clogged with the backlog of hearings on pre-*Mapp* searches, and the pending cases of new defendants whose trials would be delayed. The hearings frequently would produce unreliable results. In many cases, passage of time fades memories, renders witnesses and tangible evidence unavailable, and therefore precludes accurate assessment of Fourth Amendment claims, which usually turn on closely contested questions of fact, judged by vague standards of law.

Some of the claims eventually would prevail, but since these cannot be identified in advance, the foregoing effects

on the state judicial systems of allowing all the claims would be the price of the minority that succeeded. The implications of retroactivity of *Mapp* cannot be judged solely by hypothesizing the claims that would be sustained, without considering these effects of requiring the system to make the initial inquiry.

***4. The federal courts would also be affected.***

Retroactivity of *Mapp* would also add to the congestion of the already overburdened *federal* courts (see note 1, *supra*). Unsatisfied state prisoners would petition for federal writs of habeas corpus, or certiorari.[2] The federal judiciary, and states' attorneys, would be caught up in relitigating claims already presented to the states.

In addition, a holding of retroactivity would subject past federal convictions to re-examination. Prior to *Mapp*, the federal courts excluded evidence that was obtained

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2. The following chart shows the increase in petitions for certiorari filed in this Court [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF DIRECTOR 180-181; *Henry* v. *Mississippi*, *supra*]:

| *October Term* | *In Forma Pauperis* | *Appellate Docket* | *Total* |
|---|---|---|---|
| 1953 | 528 | 603 | 1,131 |
| 1954 | 543 | 626 | 1,169 |
| 1955 | 583 | 787 | 1,370 |
| 1956 | 639 | 851 | 1,490 |
| 1957 | 680 | 716 | 1,396 |
| 1958 | 772 | 760 | 1,532 |
| 1959 | 836 | 767 | 1,603 |
| 1960 | 950 | 718 | 1,668 |
| 1961 | 1,138 | 778 | 1,916 |
| 1962 | 1,213 | 823 | 2,036 |
| 1963 | 1,532 | — | — |

unlawfully [see *Weeks* v. *United States*, 232 U. S. 283 (1914)]. That exclusion, however, was not a constitutional requirement, but a "rule of evidence," based on this Court's "supervisory power over the administration of justice in the federal courts," and for that reason state cases were uniformly distinguished [see *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Elkins* v. *United States*, 364 U. S. 206, 216 (1960)]. *Mapp* destroyed the distinction when, overruling *Wolf*, it based exclusion directly on the Constitution. Since the Fourth Amendment forbids admission of unlawfully seized evidence in state courts, the same constitutional rationale now applies to federal trials [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)], and if the exclusionary rule applies retroactively to state judgments because it is "fundamental," it affects previous federal judgments as well.

The federal post-conviction collateral proceedings—habeas corpus and motions to vacate judgments [28 U. S. C. §§2241, 2255]—are generally unavailable to test most claims that could have been raised on direct appeal [*Hill* v. *United States*, 368 U. S. 424 (1962)], and might therefore be inapplicable to a large number of prior federal prosecutions involving search and seizure questions [but *cf. United States* v. *Sutton*, 321 F. 2d 221 (4th Cir. 1963)]. Under petitioner's view, however, subsequent decisions that changed the federal constitutional standards could be invoked retroactively by federal defendants, because these new "fundamental" rights were unavailalbe at the time of trial and appeal.

For example, federal prisoners who were convicted previously in federal courts on the basis of evidence obtained

by state officers through searches, or wiretapping, have sought to reopen their cases because of this Court's subsequent overruling of the "silver platter" doctrine [*Elkins* v. *United States, supra,* overruling *Lustig* v. *United States,* 338 U. S. 74, 79 (1949)], a result which, in *Mapp,* rose to constitutional status. The circuit courts have rejected such claims, on the ground that *Mapp* is not retroactive [*Gaitan* v. *United States,* 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States,* 306 F. 2d 880 (10th Cir. 1962); *Reynolds* v. *United States,* 324 F. 2d 371 (5th Cir. 1963); see also *United States* v. *Zavada,* 291 F. 2d 189 (6th Cir. 1961) (pre-*Mapp* decision that *Elkins* is not retroactive); *Alexander* v. *United States,* 290 F. 2d 252 (5th Cir. 1961) (*semble*)]. Petitioner's argument entails reversal of these decisions, and exposure of countless other past federal judgments to the changing currents of Fourth Amendment jurisprudence.

### C. These Burdensome Effects of Retroactivity Would Impair the Administration of Justice, to the Detriment of Defendants with More Urgent Interests.

#### *1. Retroactivity of Mapp would severely impair the ability of the judicial system to assimilate pressing recent changes in criminal law.*

A major harm from requiring the state and federal courts to entertain and review Fourth Amendment claims of all pre-*Mapp* defendants, for the sake of the relatively few defendants who would eventually prevail, is the resulting impairment of the present effectiveness of the judicial system. The immense eruption of complex litigation described above would hinder the important adjust-

ment of the judicial system to broad current changes in many areas of criminal law. Because of these essential changes in less than a generation, the system of justice that is embodied in the Constitution, as presently interpreted, is younger than most defendants whom the new rules benefit. These transformations have placed sufficiently heavy responsibilities on state—and federal—systems of criminal justice.

The local trial court, appellate court, prosecutor, attorney general, police department, and bar—the latter often prevailed upon by the trial and appellate judiciary to serve with little or no compensation—are already engaged in the complex, costly and time-consuming task of reexamining thousands of past judgments, altering present practice, and planning future procedures, in the light of the new developments. *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], for instance, has voided innumerable convictions, and led to many new trials, for defendants who were not represented by counsel in the past. Provisions for public defenders, assignment of counsel, and other assistance for indigent defendants are being enacted for the future. *Griffin* v. *Illinois* [351 U. S. 12 (1956)] and succeeding cases have required local appellate courts, states' attorneys, public defenders, and assigned private counsel to process appeals from countless previous judgments. Present appellate procedures have been liberalized. *Fay* v. *Noia* [372 U. S. 391 (1963)] added immeasurably to the obligations of the administration of justice, state and federal, by permitting prisoners to raise, under certain conditions, claims that could have been presented earlier, before their cases were closed. Much of the recent torrent

of federal habeas corpus petitions by state prisoners (see n. 1, *supra*) must be attributable to *Noia*. These petitions, although generally without merit, often require burdensome review of court records, and preparation of answering papers. Those with prima facie merit may entail investigations and hearings.

Another broad decision, *Jackson* v. *Denno* [378 U. S. 368 (1964)], will require fifteen states, nine of which had no exclusionary rule before *Mapp*, and several federal circuits to enact new trial procedures for testing voluntariness of confessions. The process has also begun to extend back to previously closed cases. In New York, for example, numerous old cases are going to be re-examined because of the *Jackson* decision, as interpreted by the New York Court of Appeals [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. Jour., Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965)]. Trial and appellate courts, defense lawyers, who will often have to be assigned without compensation, and prosecutors will devote considerable time examining lengthy trial records, and conducting new hearings. Officers in understaffed police forces may be required to testify. Unavoidably, trials of subsequently arrested defendants may be postponed. Also, future trials involving confessions or admissions will be longer and more burdensome to the community. Because the New York Constitution has been interpreted to require a jury trial as to voluntariness, the decision in *Jackson* meant adoption of the cumbersome two-stage "Massachusetts rule" [*People* v. *Huntley*, *supra*].

These important applications of newly evolved fundamental rights to past, present and future cases would be

handicapped by deployment of limited, overtaxed resources of the bench, bar, police and states' attorneys to the far less pressing matters of disinterring and vainly attempting to reconstruct in the light of *Mapp* countless cases of undeniably guilty defendants, who were represented by counsel, whose confessions, if any, were uncoerced, and whose convictions were entered before the present right of exclusion had evolved. In cases brought by individual defendants, the interpretation of the Constitution in a federal system often requires examination of the judicial system as a whole, judgments as to the priority of public resources, and comparisons among classes of defendants. Unless demonstrably necessary, a situation absent here, assimilation of the fruits of the judicial evolution of recent years should not be restricted by a requirement of digging into past trials to find occurrences now deemed unconstitutional, particularly if, as petitioner suggests, the number of state prisoners able to show that unlawfully seized evidence was used at trial will be small (petitioner's brief, pp. 14-15).

The foregoing discussion as to the burdens that retroactivity would impose upon the administration of justice clarifies further differences between the instant case, and the retroactivity of the rights to appeal and have trial counsel regardless of indigency, and to test a claim of coercion without a jury. In the latter situations, the disruption of the judicial system entailed by entertaining the claims of previously convicted defendants, while substantial, as was shown above, is significantly less than here. For instance, in those cases the initial inquiry into the primary allegations of unconstitutionality—deprivation of an appeal, ab-

sence of counsel, or use of the jury to determine voluntariness—usually can be tested promptly by looking at a few documents. But initial inquiry into the claim that evidence used at trial was produced by an unlawful search would be cumbersome and time-consuming; not only must the trial record be reviewed, but in most cases a hearing would be required thereafter. In addition, the relative ease of verification in the former cases discourages frivolous or dubious applications and means that almost every claim will have merit, a situation absent here. And in cases arising under *Griffin* and *Jackson*, if the court determines, after the simple initial inquiry, that the fundamental procedural right was violated, the second inquiry—to determine whether there was error at trial, or coercion—is generally easier, and more dependable, than the judgment whether, years ago, there was a "search", and if so, whether it was unconstitutional. Trial error appears on the face of the record. Most of the facts as to the claim of coercion will also appear on the trial record, which can usually be reviewed by the original judge [see *People* v. *Huntley*, *supra*]; additional evidence, if any, would generally come from the defendant, who is always available. The ultimate factual inquiry under *Mapp*, however, as was shown above, would be much more difficult, and generally less reliable.

### 2. *Retroactivity of Mapp would impair the free development of constitutional law in the future.*

Retroactivity would unsettle not only past judgments in all states and the federal courts, but also future state and federal cases involving search-and-seizure questions. If this Court agrees with petitioner that "All decisions of the Supreme Court interpreting the Constitution are retro-

spective in scope" (petitioner's brief, p. 19), then future interpretations of the content of the Fourth Amendment, like the exclusionary rule itself, will be applicable to previous cases. In the field of search and seizure, the prospect of forthcoming "fundamental" interpretations is unlimited. "Because there can be no fixed formula, we are admittedly met with 'recurring questions of the reasonableness of searches' * * * [L]ess is not to be expected when dealing with a Constitution" [see *Mapp* v. *Ohio*, 367 U. S. 643, 653 (1949)].

Among the many challenging "recurring questions" to be reviewed by state and federal courts are the elusive meaning of "probably cause," a concept already transformed from "circumstances which warrant suspicion" [see *Locke* v. *United States*, 11 U. S. (7 Cranch) 339, 348 (1813)] to "reasonable ground for belief of guilt" [see *Brinegar* v. *United States*, 338 U. S. 160, 175, n. 14 (1949)], and one whose application in particular cases often turns on the decision of a divided Supreme Court; the continuing development of standards of probable cause applicable to automobiles, and other modern forms of transportation that were unknown to the founding fathers [see *Carroll* v. *United States*, 267 U. S. 132 (1925); *United States* v. *Bonanno*, 180 F. Supp. 71 (S. D. N. Y. 1960)]; determinations whether flight may be considered an element of probable cause, recently the subject of a 4-4 vote in this Court [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *compare Husty* v. *United States*, 282 U. S. 694, 700-701 (1931); *Brinegar* v. *United States*, 338 U. S. 160, 166, n. 7 (1949)]; the sufficiency of a single informant's communications to establish probable cause [see *Wong Sun* v. *United*

*States, supra*]; the right of police to stop for brief questioning or "frisk" suspicious persons travelling abroad [see N. Y. CODE CRIM. PROC. §180-a; N .H. REV. STAT. ch. 594; DEL. CODE §§1901-1932; R. I. GEN. L. t. 12, ch. 7; *People* v. *Rivera*, 14 N. Y. 2d 441 (1964), *cert. denied* —— U. S. —— (1965); *People* v. *Jackson*, 331 P. 2d 63 (Cal. 1958); *People* v. *Martin*, 293 P. 2d 52 (Cal. 1956)]; the admissibility in a state court of evidence obtained by wiretapping; the required proximity of a search to a lawful arrest; the shifting boundaries of the "curtilage" that is protected from official intrusion; the lawfulness of seizing "evidentiary" material [see *Gouled* v. *United States*, 255 U. S. 298, 309-311 (1921)]; the constitutionality of a police entry without announcement, on which this Court is closely divided [see *Ker* v. *California*, *supra*]; the extent to which voluntary oral statements are "fruits" of a search [see *Wong Sun* v. *United States*, *supra*]; whether the identity of an informer must be revealed to the defendant at a hearing on probable cause; whether the burden of proof at a hearing on the motion to suppress rests with the defense or the state [*compare United States* v. *Rivera*, 321 F. 2d 704 (2d Cir. 1963) *with Wilson* v. *United States*, 218 F. 2d 754 (10th Cir. 1955)]; and whether a "harmless error" doctrine may be applied to search and seizure questions on direct review of judgments, a question still undecided by this Court [see *Fahy* v. *Connecticut*, 375 U. S. 85 (1963)]. The simplicity of the "all-or-nothing" exclusionary rule creates the seductiveness of retroactivity; it hinders the realization that retroactivity of that simple rule implies eternal retroactivity of all new decisions concerning the unclear, complex content of the right that the rule enforces.

The inherent flexibility of the constitutional right that exclusion enforces, combined with the enormous scope of retroactivity—its potential application to numberless past and future judgments in every state and the federal jurisdiction—point to another major harm that retroactivity would inflict on the judicial system. "*[A]ll* rules of law and human society are no more than working rules based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life."[3] This evolution should proceed unfettered by the dead-hand control of an arbitrary requirement that, regardless of the circumstances, old cases, properly settled under principles appropriate to that earlier stage in the creative judicial evolution, must continuously be exhumed and re-examined under new principles that are based on a different experience. The crux of most Fourth Amendment issues is current views of reasonableness and fairness, measured by contemporary, not past, experience. Since retroactivity of the exclusionary rule would be a permanent funnel for retroactivity of the fluid contents of the Fourth Amendment it would inhibit continuing formulations of the right that are suitable for present cases.

As the discussion earlier showed (pp. 7-8, *supra*), development of the exclusionary rule itself would have been hindered by a presumption of retroactivity. The evolution of the exclusionary rule has ended, but refinement of the Fourth Amendment continues. For example, as was noted above, state and federal courts are presently confronted

3. Letter from Arthur Linton Corbin, quoted in *Bibliography of the Published Works of Arthur Linton Corbin*, 74 YALE L. JOUR. 310, 311 (1964); see CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921); CARDOZO, THE GROWTH OF THE LAW 53-54 (1925).

with claims that at hearings on motions to suppress evidence, defendants are entitled to know the identity of informers. The standards evolving from these cases depend on each court's delicate balancing of the effect of disclosure on current requirements of effective law enforcement, and the importance of disclosure to the defendant in the context of present-day trial procedures. A few state and federal courts, weighing these practical considerations, have held that the Fourth Amendment requires disclosure under certain conditions [see *United States ex rel. Coffey* v. *Fay*, 234 F. Supp. 543 (S. D. N. Y. 1964), *appeal pending; People* v. *Malinski*, 15 N. Y. 2d ——, N. Y. L. JOUR. Feb. 5, 1965, p. 4, col. 2 (Dec. 19, 1964); *Priestly* v. *Superior Court*, 330 P. 2d 39 (Cal. 1958); *Drouin* v. *State*, 160 A. 2d 85 (Md. 1960); *compare People* v. *Coffey*, 12 N. Y. 2d 443 (1963), *cert. denied* 376 U. S. 916 (1964)]. In the jurisdictions involved in each of the cited cases, however, the prevailing exclusionary rule, state or federal, has been held not retroactive. The spectre of retroactivity would have had an inhibitory effect on the development of rules relating to disclosure.

Similarly, the continuing examination in state and federal courts of the question whether a "harmless error" rule is consistent with contemporary conceptions of the Fourth Amendment would be handicapped by an extraneous matter, the prospect that rejection of such a rule would suddenly require reopening and reversal of the countless federal and state judgments that were affirmed under the rule, both on collateral attack [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S.

947 (1963)], and direct appeal [see FED. R. CRIM. PROC. 52(a); *United States* v. *McCall*, 291 F. 2d 859 (2d Cir. 1961); *Woods* v. *United States*, 240 F. 2d 37, 40 (D. C. Cir. 1956); *Gibson* v. *United States*, 149 F. 2d 381, 384 (D. C. Cir. 1945), *cert. denied* 326 U. S. 724 (1945); *People* v. *Parham*, 384 P. 2d 1001, 1004-1006 (Cal. 1963); *State* v. *Fahy*, 183 A. 2d 256 (Conn. 1962), *reversed on other ground Fahy* v. *Connecticut*, 375 U. S. 85; *State* v. *Doyle*, 186 A. 2d 499, 507-508 (N. J. Super. 1962); *State* v. *Stevens*, 251 P. 2d 163 (Wash. 1953); *Gross* v. *State*, 201 A. 2d 808, 816 (Md. 1964); *State* v. *Pokini*, 367 P. 2d 499 (Haw. 1961)].

The circumstances requiring, or excusing, an announcement prior to police entry upon a premises to make an arrest or execute a warrant also are being continuously defined, based on contemporary local experience [see *Ker* v. *California*, 374 U. S. 23 (1963); N. Y. CODE CRIM. PROC. §799]. These developments will no doubt form the basis for future conceptions of the Fourth Amendment, and should be free from the shadow of past cases.

Retroactivity in the instant case might also impair the evolution of sound constitutional principles in other fields than the Fourth Amendment. If *Mapp*, with its tenuous claim to retroactivity, is applied to old cases, distinguishing other constitutional decisions would be difficult. State courts, whose contributions to the content of federal due process have been substantial, might be especially haunted by the ghost of old cases. The extension of the right to counsel to noncoercive post-indictment interrogation [see *Massiah* v. *United States*, 377 U. S. 201 (1964)] was founded substantially on new departures by the New York Court of Appeals [*id.* at 204-205; see *People* v. *Waterman*,

9 N. Y. 2d 561 (1961); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960)], but the latter court limited its holdings to prospective operation [see *People* v. *Howard*, 187 N. E. 2d 113 (N. Y. 1962)]. In applying right to counsel doctrine to certain pre-arraignment situations [see *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)], this Court expressed approval of principles developed in New York [see *People* v. *Donovan*, 13 N. Y. 2d 148 (1963)], and noted that many states had urged the holding in *Gideon* v. *Wainwright* [372 U. S. 335 (1963) (*amicus* brief of states' attorneys general)]. However, the New York Court of Appeals has not applied *Donovan* retroactively, and the states that called for the holding in *Gideon* urged prospective application.

All of these developments proceed without a view that retroactivity necessarily follows if a principle emerges from the cocoon of judge-made rules of evidence into the garden of "fundamental" rights. "[I]t would be regrettable if a supposed necessity to conform the criteria on habeas corpus to evolving standards of judicial administration and review in criminal trials should in the future prove to be a dogma reflexively inhibiting the evolution of those standards themselves" [Freund, *New Vistas in Constitutional Law*, 112 U. Pa. L. Rev. 631, 638 (1964)]. This analysis reveals another distinction between the exclusionary rule and the constitutional rights that have been applied to previously closed cases. Retroactivity of *Griffin*, *Gideon* and *Jackson* will leave no permanent scars on the judicial process, after the finite number of prior cases affected are cleared up. The Fourth Amendment, by contrast, is open-ended, and its continuing refinement would be restricted by eternal retroactivity of the exclusionary rule.

Dramatic evolutions are occurring in American criminal procedure. *Mapp* v. *Ohio*, *Ker* v. *California*, *Gideon* v. *Wainwright*, *Escobedo* v. *Illinois*, *Massiah* v. *United States*, *Fay* v. *Noia*, *Jackson* v. *Denno*, and *Griffin* v. *Illinois* are at the head of a long list of decisions of the last decade in federal and state courts that proclaim broad, often drastic, changes in the requirements of a system of justice. The instant case, and its companion, *Linkletter* v. *Walker*, will mark a turning point in this development. In deciding whether *Mapp* v. *Ohio* affects cases tried and closed under the previous "fundamental" law that *Mapp* overruled, this Court will determine to a great extent whether the continuing administration of criminal law is to be fluid, pragmatic and forward-looking, or inflexible and unwieldy, hindered by the past that the movement rejects.

## Conclusion

***For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.***

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